(9)

No. 04-433
Title: Joseph Anza, et al., Petitioners
v.
Ideal Steel Supply Corp.
Docketed: September 29, 2004
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (03-7381)
Decision Date: July 2, 2004
Questions Presented

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 29 2004	Petition for a writ of certiorari filed. (Response due October 29, 2004)
Oct 29 2004	Brief of respondent Ideal Steel Supply Corp. in opposition filed.
Nov 9 2004	DISTRIBUTED for Conference of November 24, 2004.
Jun 7 2005	DISTRIBUTED for Conference of June 23, 2005.
Nov 18 2005	DISTRIBUTED for Conference of November 23, 2005.
Nov 28 2005	Petition GRANTED.
Dec 19 2005	Letter from counsel for the respondent received. (Distributed).
Jan 12 2006	Joint appendix filed.
Jan 12 2006	Brief of petitioners Joseph Anza, Vincent Anza, and National Steel Supply, Inc. filed.
Jan 12 2006	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jan 23 2006	SET FOR ARGUMENT on Monday, March 27, 2006.
Feb 7 2006	CIRCULATED.
Feb 16 2006	Brief amicus curiae of National Association of Securities and Consumer Attorneys filed. (Distributed)
Feb 16 2006	Brief of respondent Ideal Steel Supply Corporation filed. (Distributed)
Mar 8 2006	Record receivef from U.S.D.C. Southern District of of New York. (1 box)
Mar 10 2006	Record received from U.S.C.A. 2nd Circuit. (1 envelope)
Mar 17 2006	Reply of petitioners Joseph Anza, Vincent Anza, and National Steel Supply, Inc. filed. (Distributed)
Mar 27 2006	Argued. For petitioners: David C. Frederick, Washington, D.C. For respondent: Kevin P. Roddy, Woodbridge, N. J.

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No. 04-

In the Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND,
NATIONAL STEEL SUPPLY, INC.,
Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether a competitor is "injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act ("RICO") where the alleged predicate acts of racketeering activity were mail fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior.

Statement Pursuant to Supreme Court Rule 29.6

Petitioner National Steel Supply, Inc. is a privately owned entity. It has no parent corporation and there is no publicly held company that owns 10% or more of their stock.

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Opinions Below

The ruling of the United States Court of Appeals for the Second Circuit dated July 2, 2004 reversing the decision of the District Court is officially reported at 373 F. 3d 251 and is reproduced at App. A at 1a.

The decision and order of the United States District Court for the Southern District of New York dismissing the plaintiff's complaint dated April 1, 2003 is reported at 254 F.Supp. 2d 464, and is reproduced at App. B at 27a.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on July 2, 2004. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provisions Involved

The relevant statutory provisions are the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, set out at App. C at 38a.

Statement of the Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction). The plaintiff's two federal claims are based upon allegations that the defendants violated the Racketeer Influenced and Corrupt

Organizations Act, 18 U.S.C. §§ 1962-1968 ("RICO"). The complaint having been dismissed by the district court on plaintiff's Rule 12 (b)(6) motion, the Record consists only of the plaintiff's amended complaint.

A. Summary of Allegations in the Amended Complaint

Plaintiff Ideal Steel Supply Corp. ("Ideal") and defendant National Steel Supply, Inc. ("National") are competitors. They sell "steel mill products (such as steel bars and sheets) and related hardware, supplies and services, to ornamental iron workers and small steel fabricators," as well as to "do-it-yourself homeowners." (Plaintiff's Amended Complaint, ¶ 16). They are the "principal competitors in New York City for the types of products they each sell" (*id.*, ¶ 15). The "overall demand" for their products "is dependent primarily upon economic activity in the real estate and construction businesses" and the general demand for "ornamental security or other ironworks" (*id.*, ¶ 22).

Sales made for resale, and sales made to tax-exempt entities (such as schools, churches, or other not-for-profit purchasers), are not subject to New York State sales tax; sales made to other purchasers are. *See id.*, ¶ 18. Ideal alleged that National did not collect sales tax on sales to those of its customers who were "cash-paying [and] non-exempt" (*id.*, ¶ 4) and that National's alleged failure to report such sales to the New York State Department of Taxation and Finance constituted "fraudulent misrepresentations" to that agency (*see id.*, ¶ 5). Plaintiff alleged that the New York State Department of Taxation and Finance "has relied and continues to rely" on the alleged fraudulent misrepresentations in defendant's sales tax returns (*see id.*, ¶ 30).

Ideal further alleged that National's failure to collect sales tax from these customers created "an improper competitive advantage for National over Ideal" (*id.*, ¶ 32). More specifically, Ideal alleged that after National opened a new facility in the Bronx in 2000--"just eight minutes by automobile from Ideal's Bronx location" (*id.*, ¶ 20)--Ideal experienced "a steep drop in taxable cash sales . . . disproportionate to the effect that National's new Bronx location had on Ideal's overall sales" (*id.*, ¶ 35).

Ideal alleged that "each occasion" of National's false filing of its New York State sales tax returns ("at least since 1998 if not before") violated the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and that each violation was a predicate act of racketeering under the Racketeer Influenced and Corrupt Organizations Act. *See* Plaintiff's Amended Complaint, ¶¶ 45-47. Ideal further alleged that National's alleged scheme "directly injures Ideal because defendants' conduct is aimed at increasing National's market share and overall profits at the expense of its principal competitor, Ideal." (*Id.*, ¶ 49.) Ideal thus sought damages for lost profits arising from the "substantial volume of its taxable cash business" which it lost to National (*see id.*, ¶¶ 50, 51).

Ideal also alleged that National had invested the "racketeering income" gained from its alleged tax avoidance when opening its new facility in the Bronx and that this gave rise to a separate violation of RICO (under § 1962(a)). As a result of this investment, Ideal alleged, it had "lost significant business and market share" (*id.*, ¶ 57). Ideal accordingly sought additional damages for this loss.

B. The Decisions Below

District Court Judge Richard Berman dismissed the complaint, holding that Ideal had failed to plead that National's actions were both the proximate cause of Ideal's damages and that Ideal itself relied upon National's misrepresentations. The court reasoned that when a RICO claim is based upon the alleged racketeering activity of mail or wire fraud, the RICO plaintiff must be able to show it relied upon the fraudulent misrepresentations. 245 F. Supp. 464, at 468-69.

The Court of Appeals reversed, remanding the case for further proceedings. Judge Kearse, thoroughly reviewing Second Circuit precedent as well as precedent from the Fourth Circuit, wrote that it was appropriate to grant standing to a "competitor alleging injury to its business resulting from racketeering activity," 373 F.3d 251, at 260, "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Id*. at 263. It was enough that Ideal was "a competitor directly targeted by defendants for competitive injury." *Id*. at 264. Accordingly, the Court of Appeals held that Ideal's complaint adequately stated a claim under § 1962 (c) for conducting an enterprise through a pattern of racketeering activity, and under § 1962 (a) for investing racketeering income in the opening of its new store in the Bronx.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of federal law on which the Circuits are split. The Second Circuit's willingness to expand standing under RICO to protect competitors when it was another party who was defrauded threatens to create a federal law of unfair competition, in which treble damages

might be available for conduct that this Court would have viewed as procompetitive in the context of antitrust litigation. The result may be to undermine this Court's carefully crafted jurisprudence in the antitrust area, a result not likely intended by Congress when it placed the antitrust treble-damages remedy in the RICO statute.

I. THE CIRCUITS ARE SPLIT

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court established the basic approach for determining when a party is "injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as required by Section 1964(c) of the Act. Drawing on decisions from the treble-damages provision of the antitrust laws, on which the RICO provision was modeled, *Holmes* held that plaintiffs are required to prove not just "but for" causation, but also "proximate" cause. *See id*. at 265-68. The Court used "proximate cause" to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id*. at 268. Although the decision in *Holmes* did not adopt any particular bright-line statement of what that limit might be, the decision did stress the importance of "some direct relation between the injury asserted and the injurious conduct alleged," adding that a plaintiff complaining of harm "from the misfortunes visited upon a third person by the defendant's acts" is generally thought "to stand at too remote a distance to recover." *Id*. at 268-69.

The Second Circuit's decision in the instant case reads *Holmes* expansively, allowing a competitor to sue under RICO even though it is not the defrauded party and even though the alleged fraudulent conduct was "directed to and

relied on by a third party rather than the plaintiff." 373 F.3d at 263. On this point there is a clear split in the Circuits.

On a formal level, this split has been expressed in the question whether "reliance" by the plaintiff is necessary, with the Circuit Courts for the Sixth and Eleventh Circuits requiring reliance and the First Circuit clearly rejecting the requirement (as did the Second Circuit in the instant case). *Compare, e.g., Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (for a cognizable claim for fraud under RICO, plaintiffs must show a material misrepresentation and "that plaintiffs in fact relied upon that material misrepresentation") and *Sikes v. Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002) (to prove injury "in a civil RICO case predicated upon mail or wire fraud," plaintiff must prove that he was "'a target of the scheme to defraud' and that he 'relied to his detriment on misrepresentations made in furtherance of that scheme.'") (supporting citations omitted), *cert. denied*, 537 U.S. 884 (2002), *with Systems Management, Inc. v. Loiselle*, 303 F. 3d 100, 103, 104 n.3 (1st Cir. 2002) (although noting that some courts have required proof that the plaintiff "relied upon the deception," court holds that plaintiff workers, who did not receive the fraudulent communications, need not show reliance because "a reasonably predictable consequence" of the fraud was to enable the defendant "to continue to underpay his workers") (dismissing suit on other grounds); *cf. Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004) (although declining to reach question whether reliance is required in a civil RICO claim based on mail fraud, court recognizes that "[o]ur sister circuits have split on this issue") (citing examples of the split).

The heart of the disagreement in the Circuits, however, is over the question whether RICO will be read expansively to

permit the recovery of damages by competitors who believe themselves disadvantaged by an alleged fraud. On this the Fourth Circuit agrees with the Second, and allows such suits, but the Sixth and Seventh do not.

In *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994), relied on by the Second Circuit in the instant case, the Fourth Circuit permitted a reseller of long-distance telecommunications service to sue its competitor under RICO on the grounds that the competitor had defrauded the competitor's customers by tricking them into thinking they were getting a better deal than they were, and that this fraud made it more difficult for the plaintiff to compete. Even though it was the defendant's customers who were the "direct victims" of the defendant's schemes, the court gave the plaintiff the opportunity to show that "the artificially low billings were purposefully devised" to hurt the plaintiff's business, thereby allowing the plaintiff to collect the "lost revenue due to the necessity of offering lower rates to match LDS's fraudulent ones." *Id.* at 263-64.

By contrast, in *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994), the Sixth Circuit did not allow a beer distributor to sue its supplier and a competing distributor under RICO for fraudulently supplying beer to the competitor, in violation of Michigan law, thereby "usurping sales" that the plaintiff would otherwise have made. *Id.* at 182. Under RICO, the court held, the fraud "must involve misrepresentations or omissions flowing from the defendant to the plaintiff." *Id.* at 184. "Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central

Distributors relied on any statement or omission to its detriment." *Id.* at 184.

More to the point is the Seventh Circuit's decision in *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996), a suit brought by a travel agency against its competitor, under both the Sherman Act and under RICO, for allegedly fraudulent statements made to customers in the course of promoting tours to Israel. After agreeing with the district court that the antitrust claim was without merit, the court of appeals considered the "more substantial RICO claim." The district court had dismissed the RICO claim on the ground that the plaintiff's injury was indirect, because the fraud involved consumers rather than the plaintiff-competitor. *See id.* at 1257. Judge Easterbrook, writing for the court of appeals, reviewed the decision of the Fourth Circuit in *Mid Atlantic Telecom* that RICO "allows suits when the predicate offenses influence customers and, derivatively, injure business rivals." Asserting that "[a] conflict among the circuits on such a question would be regrettable," the court decided to "accept *Mid Atlantic*." *Id.* at 1257.

Nevertheless, "like a troll under the bridge," to use Judge Easterbrook's colorful simile, *see id.* at 1257, there was another theory available for why the plaintiff-competitor lacked standing to bring its RICO claim. Drawing on Justice Scalia's "zone of interests" approach to standing articulated in *Holmes*, *see id.* at 1258, the court held that a plaintiff "must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Id.* The plaintiff, as a vendor to the persons deceived, was not "among the persons protected" by the Mail Fraud statute. The "essential point," Judge Easterbrook wrote, "is that the victims of the fraud are the object of solicitude;

§ 1341 [the Mail Fraud statute] does not establish a regimen of truth-telling without regard to details like who is losing out and why." *Id. Cf. Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (zone of interests test suggests that only consumers have standing to sue chicken producer for alleged fraud in connection with government poultry inspections) (dismissing RICO suit by plaintiff beef producers for lack of standing). In taking this approach to standing, the Seventh Circuit clearly placed competitors who are not the victims of the fraud and who are, therefore, only injured "derivatively," outside the coverage of Section 1964(c) of the RICO statute. "[F]irms suffering derivative injury from business torts therefore must continue to rely on the common law . . . ." *Id.* at 1258.

The Second Circuit in the instant case has taken an approach to standing that differs from the approach taken by Judge Easterbrook and the Seventh Circuit in *Israel Travel Advisory Service*, and differs as well from the Sixth and Eleventh Circuits with regard to the need for reliance. Given the conflicting views on this question of standing for competitors who are not the direct victims of a fraud, and who have not relied on any fraudulent statements, it is critical that this Court provide further guidance to the federal courts on the limits that RICO places on "a person's responsibility for the consequences of that person's own acts." *Holmes*, *supra*.

II. THE COURT SHOULD LIMIT COMPETITOR STANDING IN RICO MAIL FRAUD CASES

The concept of fraud under the federal Mail Fraud statute has proven to be extremely elastic. *See, e.g., Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (scheme to defraud is judged by a standard that is a reflection of "moral

uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society"). As this Court has recognized as well, falsehoods can have anticompetitive effect. *Cf. California Dental Association v. Federal Trade Commission*, 526 U.S. 756, 773 n.9 (1999). If these falsehoods are litigated under the antitrust laws, the courts will give them careful attention to be certain that they are truly anticompetitive. *See Israel Travel Advisory Service, supra*, 61 F.3d at 1256 ("It is an abuse of the antitrust laws to invoke them to stifle nascent competition."). Providing treble-damages under RICO for Mail Fraud violations that might harm competitors, however, is a great incentive for those competitors to bring their complaints under RICO and thereby avoid the careful antitrust analysis that this Court has given to such complaints in recent years. This helps explain why Judge Easterbrook was so careful to cabin competitor standing in *Israel Travel Advisory Service*.

Two recent cases in which this Court has carefully limited antitrust recovery suggest the danger posed by the approach adopted by the Second Circuit in the instant case. One is *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), involving a suit by a competitor for conduct which defrauded New York state regulators. Discon sued NYNEX for engaging in a boycott of its premises equipment removal services. The Second Circuit had held that boycott to be per se unlawful, but this Court reversed, holding that the boycott should be assessed under a rule of reason. The Court wrote (525 U.S. at 136-37):

> To apply the per se rule here--where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud--would transform cases involving business behavior that is improper for various reasons . . . into treble-damages antitrust cases. And that per se rule would discourage firms from changing suppliers--even where the competitive process itself does not suffer harm. . . .

The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. *Cf. Standard Oil*, 221 U.S., at 62, 31 S.Ct. 502 (noting "the freedom of the individual right to contract when not unduly or improperly exercised [is] the most efficient means for the prevention of monopoly"). At the same time, other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." . . .

The other case is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct. 872 (2004). In *Trinko* this Court upheld the dismissal of a suit by a consumer of telecommunications services who alleged that Verizon had violated Section 2 of the Sherman Act by breaching its duty under the Telecommunications Act of 1996 to share its facilities with its competitors. Verizon's conduct had been examined by the FCC and the New York Public Service Commission, both of which had imposed financial penalties for noncompliance and had required remediation measures. *See* 124 S.Ct. at 873. In finding no violation of the antitrust laws this Court noted that antitrust analysis "'must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies,'" *id.* at 881, and that "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Id.* at 879 (emphasis in original).

The care with which this Court approached the allegedly anticompetitive behavior in *Discon* and *Trinko* would not be duplicated were the litigation brought as a RICO/Mail Fraud case. The regulatory fraud in *Discon* is readily translatable into a fraud complaint, but it would then not be weighed under a rule of reason approach. The only question would be the financial impact on the competitor, not the impact on competition as tested under a rule of reason. Similarly, it would be easy for a competitor of Verizon to allege misrepresentations in Verizon's statements to regulators and seek treble damages for lost revenue, as the plaintiff sought in *Mid Atlantic*, *supra*. *See* Brief for Covad Communications Company, Inc. as Amicus Curiae in Support of Respondent, *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (No. 02-682), 2003 WL 21755938 (competitor of Verizon alleging misrepresentations by Verizon to state commissions regarding availability of space in central offices for collocating facilities). Whether such conduct was anticompetitive and the impact of such liability on incentives to invest in new facilities, however, would go unexplored in a RICO suit.

The danger posed by a broad standing rule is confirmed by the Second Circuit's decision in the instant case. One of the arguments made by the defendant's competitor is that the advantage the defendant received through the alleged fraud generated profits which, in turn, were used by the defendant to open a store close to the plaintiff and to compete more effectively. The investment of the "racketeering income," plaintiff alleged, caused it to "'los[e] significant business and market share' (Complaint ¶ 57) resulting in damages in excess of $2,000,000 (*see* Complaint ¶ 58)." 373 F.3d at 255. The Second Circuit upheld this part of the plaintiff's claim, *see id.*, at 264, but whether this "loss of market share" caused by the investment in the defendant's new store is pro- or

anticompetitive will not be tested in the RICO litigation. The focus will be on the proof of fraud, the investment of the income, and the consequent monetary injury.

The Second Circuit's extension of RICO standing to non-defrauded competitors threatens to turn RICO into a federal law of unfair competition, complete with treble damages and attorneys fees. It seems doubtful that the "background practice against which Congress legislates," *Holmes*, *supra*, 503 U.S. at 287 (Scalia, J., concurring), would lead to such an interpretation of the RICO private damages provision. Indeed, it would be ironic for RICO's private treble-damages provision, modeled as it was on the antitrust laws, to be interpreted in a way that end-runs those very laws. Review and reversal of the Second Circuit's approach to standing under RICO will thus advance the legislative purpose of both the RICO statute and the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 03-7381

[Filed July 2, 2004]

IDEAL STEEL SUPPLY CORP.,
Plaintiff-Appellant,

v.

JOSEPH ANZA, VINCENT ANZA,
and NATIONAL STEEL SUPPLY, INC.,
Defendants-Appellees.

Appeal from a judgment of the
United States District Court
for the Southern District of New York
Richard M. Berman, Judge

Before: WALKER, Chief Judge, and KEARSE and CABRANES, Circuit Judges.

OPINION

KEARSE, Circuit Judge:

Plaintiff Ideal Steel Supply Corp. ("Ideal") appeals from a judgment of the United States District Court for the Southern District of New York, Richard M. Berman, Judge, dismissing its amended complaint, brought principally under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000) ("RICO"), alleging that Ideal's business had been injured by reason of the practice of defendants National Steel Supply, Inc. ("National"), et al., of failing to charge certain customers sales taxes as required by New York State ("State") law and thereafter sending the State Department of Taxation and Finance ("State Tax Department") fraudulent sales tax reports by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. Ideal also asserted a state-law claim for breach of contract. The district court dismissed the RICO claims pursuant to Fed. R. Civ. P. 12(b)(6), ruling that the complaint did not state a claim under 18 U.S.C. § 1964(c) because it failed to allege the necessary causation, in that it did not, and could not, assert that the alleged misrepresentations had been relied on by Ideal. The court declined to exercise supplemental jurisdiction over the contract claim and dismissed that claim without prejudice. On appeal, Ideal contends that it adequately pleaded that its lost sales were proximately caused by National's pattern of offering customers lower bottom-line cost by means of the unlawful omission of state sales tax and concealing those omissions by means of mail and wire fraud. For the reasons that follow, we agree.

I. BACKGROUND

We summarize below the allegations of the amended complaint ("complaint"), the truth of which is assumed as is required on review of a Rule 12(b)(6) dismissal. We take those allegations, and the reasonable inferences that can be drawn from them, in the light most favorable to Ideal.

A. The Competitors

Ideal is in the business of purchasing steel mill products from manufacturers outside of New York State and selling those products and related hardware and services to professional ironworkers, small steel fabricators, and do-it-yourself homeowners, for use in the New York, New Jersey, and Connecticut area. It has retail stores in Queens and the Bronx.

National, which is owned by defendants Joseph and Vincent Anza (collectively "the Anzas"), sells substantially the same products as Ideal to essentially the same customer base. National has retail outlets in Queens and the Bronx, located a few minutes' drive from Ideal's stores.

Ideal and National are the only substantial competitors in the Bronx or Queens for sales of the steel products they carry. No businesses in those areas other than Ideal and National carry "the same or a similar comprehensive array of products and services or compete for the same customers." (Complaint ¶ 3.) Given the similarity of their product lines (which comprise "generic commodities," *id.*) and the proximity of their retail outlets to each other in each Borough, Ideal and National compete against one another "primarily on the basis of price" (Complaint ¶ 21); "differences in prices charged by Ideal and National affect customers' decisions to purchase

from one or the other" (Complaint ¶ 22). Price fluctuation, however, does not affect overall demand for the products offered by Ideal and National; rather, overall demand is determined by "economic activity in the real estate and construction businesses" and other considerations beyond the control of National or Ideal. (*Id.*)

B. The Allegedly Fraudulent Scheme

Under State law, Ideal and National are required to charge, collect, and remit to the State a combined state and local sales tax of 8B percent on any sale for which the customer does not qualify for an exemption. (*See* Complaint ¶¶ 23-25.) All sales are presumed by law to be taxable unless, within 90 days of purchase, the purchaser presents to the seller a valid resale or exemption certificate. (Complaint ¶ 23.)

Both Ideal and National conduct much of their business on a cash-and-carry basis. According to the complaint, Ideal complies with the state-law requirements that it charge and pay sales taxes, but National does not. The complaint alleged that, at the direction of the Anzas, National does not charge cash-paying non-exempt customers any sales tax; this allows those customers to save 8B percent on their purchases, thereby incurring a substantially lower bottom-line cost than they would incur by purchasing the same items from Ideal.

In order to maintain its profit margin while drawing customers away from Ideal with these unlawful "cash, no tax" sales, National, having refused to charge and collect the sales tax, simply does not pay the tax due on those sales. To conceal the amounts due, National has, since at least 1998, submitted fraudulent sales tax reports to the State Tax Department, failing to report those sales and misrepresenting

its total taxable sales. (Complaint ¶¶ 29-30.) National has filed the fraudulent reports, which are essential to the success of this scheme, by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343.

Ideal commenced the present action in 2002, alleging that National's "cash, no tax" sales, along with the necessary fraudulent reporting, were intended to and did injure Ideal's business. The complaint alleged that National's repeated fraudulent mailings and/or wire transmissions--on which the State Tax Department relied and continues to rely, enabling National to avoid paying sales tax on a significant portion of its taxable sales--constituted a pattern of racketeering activity that "continues to the present day." (Complaint ¶ 30.) Ideal alleged that its own list prices were, on average, no higher than those of National, and that but for defendants' "cash, no tax" scheme, National would have had no competitively significant price advantage over Ideal. The complaint alleged that as a result of the Anzas' operation of National through the above pattern of racketeering activity, in violation of RICO § 1962(c), Ideal had suffered "lost profits in an amount . . . believed to exceed $ 5,000,000." (Complaint ¶ 51.)

In addition, the complaint alleged that the Anzas and National had violated RICO § 1962(a) by using profits gained from the "cash, no tax" scheme at National's Queens facility to open its outlet in the Bronx. (*See* Complaint ¶ 55.) That investment of racketeering income, along with defendants' implementation of the "'cash, no tax' scheme at that location" as well caused Ideal's Bronx outlet to "los[e] significant business and market share" (Complaint ¶ 57) resulting in damages in excess of $2,000,000 (*see* Complaint ¶ 58).

The complaint also alleged that defendants' "cash, no tax" scheme violated the terms of an agreement that had settled an

earlier lawsuit between the parties. (Complaint ¶ 66.) The complaint requested treble damages on each RICO claim and single damages on the contract claim.

C. The Decision of the District Court

Defendants moved to dismiss the complaint pursuant to, inter alia, Fed. R. Civ. P. 12(b)(6), arguing that Ideal lacked standing to bring its RICO claims because it had not adequately alleged that its injuries were proximately caused by defendants' alleged violations of § 1962. In a Decision and Order reported at 254 F. Supp. 2d 464 (2003), the district court granted the motion, stating in part as follows:

> Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,' meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 1999 U.S. Dist. LEXIS 17625, 97 CIV. 9380, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), aff'd 2 Fed.Appx. 109, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995)
> . . . .

254 F. Supp. 2d at 467-68 (emphasis in original). The court ruled that Ideal had failed to plead transaction causation:

> Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged--indeed can not allege--that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail.

Id. at 468.

The court stated that although some RICO claims, such as those asserted in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), are based on predicate acts that do not involve reliance, a RICO plaintiff must be able to show reliance--its own reliance--when the alleged racketeering activity on which its RICO claim is based is mail fraud or wire fraud. *See id.* at 468-69.

Having concluded that Ideal's RICO claims must be dismissed pursuant to Rule 12(b)(6), the court declined to exercise supplemental jurisdiction over Ideal's contract claim, and it dismissed that claim without prejudice. Judgment was entered accordingly, and this appeal followed.

II. DISCUSSION

On appeal, Ideal contends that, despite the fact that it did not itself rely on National's mail and wire frauds, it has

standing to assert its civil RICO claims because it alleged facts sufficient to show that injury to its business was proximately caused by National's pattern of racketeering activity and investment of racketeering income. Because the complaint alleges that Ideal was a competitor of National and was an entity directly targeted for injury by National's racketeering activity, we agree.

A. Mail and Wire Fraud Racketeering Activity

RICO authorizes a private right of action for treble damages by a "person injured in his business or property by reason of a violation of section 1962 of [Title 18]." 18 U.S.C. § 1964(c). Section 1962 provides, in pertinent part, that

> it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce,

18 U.S.C. § 1962(a), and that

> it shall be unlawful for any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity,

id. § 1962(c).

RICO defines racketeering activity to include mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1). The mail and wire fraud statutes prohibit the use of those means of communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. The mailing of false state sales tax returns may constitute mail fraud in violation of § 1341. *See, e.g., United States v. Porcelli*, 865 F.2d 1352, 1360-61 (2d Cir.), *cert. denied*, 493 U.S. 810, 110 S. Ct. 53, 107 L. Ed. 2d 22 (1989); *see also United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996) ("Because the[mail and wire fraud] statutes use the same relevant language, they are analyzed in the same way.").

Generally, two or more related acts of racketeering activity may be considered a "pattern" of racketeering activity. *See* 18 U.S.C. § 1961(5); *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir.) (*en banc*), *cert. denied*, 491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 700 (1989).

B. Civil RICO Claims and Proximate Causation

The requirement in § 1964(c) that a civil RICO plaintiff show that it was injured in its business or property "by reason of" the defendant's RICO violation means that the plaintiff must plead and prove that the violation not only was the logical, or "but for," cause of the injury but also was its legally cognizable, or proximate, cause. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir.), *cert. denied*, 124 S. Ct. 532, 157 L. Ed. 2d 424 (2003); *Commercial Cleaning*

Services, L.L.C. v. Colin Service Systems, Inc., 271 F.3d 374, 380 (2d Cir. 2001) ("*Commercial Cleaning*"); *In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 399 (2d Cir. 1994) ("*American Express*").

> "Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom may have been injured by his conduct, but only those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was 'reasonably foreseeable or anticipated as a natural consequence.'"

Lerner v. Fleet Bank, N.A., 318 F.3d at 123 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990)), *cert. denied*, 513 U.S. 1079, 115 S. Ct. 728, 130 L. Ed. 2d 632 (1995)).

> The requirement that a defendant's actions be the proximate cause of a plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. *See Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988). In marking that boundary, the Supreme Court has emphasized that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient."

Commercial Cleaning, 271 F.3d at 380 (quoting *Holmes*, 503 U.S. at 268 (other internal quotation marks omitted)).

1. Operating an Enterprise in Violation of § 1962(c)

Applying these principles to claims that the affairs of a RICO enterprise have been conducted in violation of subsection (c) of § 1962, we have upheld dismissals of a variety of civil RICO complaints where the alleged injury was too remote from the alleged racketeering activity. For example, in *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988), the plaintiffs sought damages from a defendant convicted of insider trading in certain stocks, alleging that the plaintiffs lost money investing in other companies in which the defendant was a also shareholder. Plaintiffs' theory was that the defendant's reputation as a successful investor--gained as a result of his pattern of insider trading--had artificially inflated the prices of the stocks purchased by the plaintiffs. The complaint alleged that the plaintiffs suffered investment losses as the prices of those shares fell following the defendant's conviction for insider trading. *See id.* at 62. We affirmed the Rule 12(b)(6) dismissal because the alleged injuries were too remote from the defendant's unlawful activity.

In *Hecht v. Commerce Clearing House, Inc.*, the plaintiff brought a civil RICO action against his former employer and co-workers, alleging that they had implemented a scheme to defraud customers in violation of the mail fraud and wire fraud statutes. The plaintiff alleged that he had been injured by the fraudulent scheme both because clients whom he had serviced had discovered the frauds and ceased to do business with his employer, thereby costing him commissions he would have otherwise earned, and because he had been fired for

refusing to participate in the frauds. *See* 897 F.2d at 22-24. We upheld the district court's dismissal of the plaintiff's claims, explaining that the plaintiff was "'neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s],'" and that the plaintiff's injuries, as a result, were not "reasonably foreseeable . . . natural consequence[s] of the RICO violations" for purposes of § 1964(c). *Id.* at 24 (quoting *Sperber v. Boesky*, 849 F.2d at 65).

In *Lerner v. Fleet Bank, N.A.*, the plaintiffs, who had invested with an attorney who absconded with their money, brought civil RICO claims against the banks in which their funds had been deposited. The plaintiffs claimed that the banks had engaged in racketeering activity, to wit, mail and wire fraud, by sending back to various payees bounced checks that the banks stamped "refer to maker," rather than "insufficient funds"; telling some payees that their checks had been dishonored because of a computer error or because the check had been written on the wrong account, rather than because the attorney had insufficient funds; and sending statements to the attorney that did not mention the dishonored checks. *See* 318 F.3d at 119. The plaintiffs alleged that the banks also failed to report the attorney's overdrafts and other defaults to state disciplinary authorities, which would have caused the attorney to be disbarred and thereby led the plaintiffs to discontinue their investments with him. We held that the connection between the plaintiffs' injuries and the banks' mailings, which obscured the attorney's criminal behavior, was far too attenuated to meet the requirement of proximate cause and that the complaint thus failed to state a civil RICO claim. *See id.* at 122-24.

In *American Express*, we upheld the Rule 12(b)(6) dismissal of a derivative action complaint by shareholders of

American Express alleging that company officials had committed mail and wire frauds and repeated acts of bribery in an effort to defame one Edmond J. Safra, an American Express competitor. *See* 39 F.3d at 396-98. When the fraudulent acts were discovered, American Express was injured by, *inter alia*, losing business and goodwill and having to pay millions of dollars in legal fees and settlements. We upheld the dismissal of the complaint because the alleged injuries to the company were not proximately caused by the racketeering activities of fraud and bribery but rather were caused by the fact that those activities did not have their intended effect and were discovered by their intended target. The target of the unlawful acts was Safra, not American Express; the "RICO defendants' scheme was 'an illicit scheme to injure a potential major competitor of [American Express].'" *Id.* at 400 (quoting the plaintiffs' brief on appeal).

> The injuries alleged thus were neither the "preconceived purpose" nor the "specifically-intended consequence" of the RICO defendants' acts. Moreover, any losses to American Express were caused only because the scheme itself was exposed and thus failed. Therefore, the harm to American Express was neither the "necessary result" of the scheme nor . . . "foreseeable" . . . .

Id.

We reached a similar result in *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816, 117 S. Ct. 66, 136 L. Ed. 2d 27 (1996), in which the defendant advertising agency had paid nearly $1 million to two individual defendants who informed it, falsely, that Abrahams, then a Jamaican tourism official, could be bribed to grant the agency the Jamaican Tourism Board ("JTB")

advertising business. Although none of the bribery money was ever given to Abrahams, he was indicted along with the scheme's participants. After the charges against him were dropped, Abrahams brought a civil RICO action alleging "injuries to his reputation and to his emotional, financial, political, and social status resulting from widespread public dissemination of false information about his role in the bribery scheme." *Id* at 236. We noted, however, that "Abrahams was neither an intended target of the scheme nor an intended beneficiary of the laws prohibiting it." *Id*. at 238. Nor was he injured by the scheme itself; rather, "Abrahams was injured . . . by the fallout from the scheme's exposure." *Id*. at 239. We thus upheld the dismissal of Abrahams's complaint for failure to state a civil RICO claim on the ground that his injuries were not sustained "by reason of" the agency's racketeering activity within the meaning of § 1964(c).

In *Baisch v. Gallina*, in contrast, we reversed the grant of summary judgment dismissing the civil RICO claims asserted by a plaintiff lender against insurance brokers and an operator of Raycon Construction Co. ("Raycon"), a company that, in order to do business with Nassau County, was required "to provide the County with estimates of the number and type of workers needed for each project, along with the number of hours to be worked and the hourly rate per worker." 346 F.3d at 369. The complaint alleged that "the defendants engaged in a pattern of racketeering activity by causing Raycon to submit to Nassau County fraudulent documents, including inflated estimates and falsified claim vouchers." *Id*. Baisch entered into a factoring agreement with Raycon and lost money when Raycon submitted the fraudulent vouchers--and other vouchers not even submitted to the County--to him, and he advanced funds based on those fraudulent vouchers. The district court ruled that Baisch lacked standing to bring a

civil RICO claim because the party directly injured by the alleged racketeering activity would have been the County. We disagreed with the premise that only one category of victim has standing to bring a civil RICO claim. We noted that the foreseeability component of proximate cause is established where the plaintiff was a "target[]" and "intended victim[] of the racketeering enterprise," *id*. at 374 (internal quotation marks omitted), even if he was not the primary target or victim, and that "no precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing," *id*. at 375. We noted that the frauds on Baisch and the County were intertwined, and we held that Baisch had standing to pursue a RICO claim based in part on the false vouchers submitted to the County because "the defendants specifically targeted [him] as their victim allegedly by taking his loans under false pretenses and consciously creating a high risk of defaulting on those loans." *Id*.

In each of the above cases in which we approved the summary dismissal of the complaint, we noted that the plaintiffs were not competitors of the racketeering enterprise or targets of alleged racketeering activity. *See, e.g., Lerner v. Fleet Bank, N.A.*, 318 F.3d at 124 ("We have repeatedly emphasized that the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise."); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d at 24 (plaintiff was "neither the target of the racketeering enterprise nor the competitor[] . . . of the racketeer[s]" (internal quotation marks omitted)); *Sperber v. Boesky*, 849 F.2d at 65 (plaintiffs were "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer"). The view that a competitor alleging injury to its business resulting from racketeering activity of a defendant competitor adequately pleads proximate cause within the meaning of § 1964(c) is consistent

with the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). In *Sedima*, a divided Court ruled that a civil RICO plaintiff, who had alleged predicate acts of mail and wire fraud, could recover damages not only for "racketeering injury," but also for injury caused directly by RICO predicate acts. *See id.* at 495-96. Although the Court was divided on that issue, all members were in agreement that the principal persons for whose benefit the RICO private right of action was created included a defendant's "competitors . . . whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration in the relevant market," or who could "plead and prove that they suffered . . . injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity," 473 U.S. at 519-20 (Marshall, J., dissenting); *see* 473 U.S. at 497 n.15 (majority opinion, stating that damages recoverable under RICO "include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery").

In *Commercial Cleaning*, we reversed the Rule 12(b)(6) dismissal of a civil RICO complaint alleging that the plaintiff's competitor had engaged in a pattern of racketeering activity, to wit, knowingly hiring undocumented aliens in violation of 8 U.S.C. § 1324(a), which "enabled [the defendant] to lower its variable costs and thereby underbid competing firms, which consequently lost contracts and customers to [the defendant]." 271 F.3d at 378. We noted that the plaintiff was

> not alleging an injury that was derivative of injury to others. Commercial does not seek to recover based on the misfortunes visited upon a third person by the defendant's acts. . . . It claims to have lost profits

> directly as the result of [the defendant's] underbidding, which it achieved through its violation of § 1324(a). *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994) (holding that the value of business opportunities lost due to defendant's RICO violations is compensable); *Mid Atlantic Telecom Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (noting that plaintiff was not seeking to vindicate claims of customers who accepted defendant's fraudulent, ostensibly lower rates, but rather alleged "distinct and independent injuries: lost customers and lost revenues") . . . . We have stated a plaintiff has standing where the plaintiff is the direct target of the RICO violation. *See Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 238 (2d Cir. 1996); *American Express*, 39 F.3d at 400 (targets of RICO violations were competitive rivals not shareholders harmed by decrease in stock value upon exposure of scheme); *see also Mid Atlantic Telecom*, 18 F.3d at 263 (plaintiff has standing if it can show that it was a "direct target" of defendant's RICO violations). As discussed above, the theory of Commercial's claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals, thus qualifying them as direct targets of the RICO violation.

Commercial Cleaning, 271 F.3d at 384 (internal quotation marks omitted).

In the present case, the district court viewed our holding in *Commercial Cleaning* as inapposite here because the predicate acts alleged in that case were not frauds. We disagree with the court's conclusion. As revealed in the above quotation, *Commercial Cleaning* itself relied in part on the

reasoning of cases such as *Abraham[illegible]ung & Rubicam Inc.* and *American Express*, in which the alleged predicate racketeering activities included acts of fraud. In particular, we cited with approval *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.) ("*Mid Atlantic*"), *cert. denied*, 513 U.S. 931, 115 S. Ct. 323, 130 L. Ed. 2d 283 (1994), in which the Fourth Circuit held that a competitor had standing to bring a civil RICO claim where the only racketeering activities alleged were mail frauds in communications from the defendants to the plaintiff's customers. In that case, Mid Atlantic Telecom, Inc. ("Mid Atlantic"), and defendant Long Distance Services, Inc. ("LDS"), were resellers of long-distance telecommunications services competing for the same customers. The complaint alleged that the defendants had engaged in a pattern of fraudulent mailings, soliciting customers by offering them artificially low rates, lower than Mid Atlantic's basic rates, forcing Mid Atlantic to meet the apparently lower LDS rates. However, "in practical effect, . . . the quoted [LDS] rates were not [as] low[as had been represented], since additional minutes were randomly and artificially added [by the defendants] to the lengths of telephone calls" made by LDS customers. *Mid Atlantic*, 18 F.3d at 261. The defendants contended that "Mid Atlantic d[id] not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did"; that, therefore, defendants' "customers were the only victims of the alleged fraud"; and hence "the [defendants'] solicitations could not have been the proximate cause of Mid Atlantic's injuries." *Id.* at 263. The Fourth Circuit rejected these contentions and vacated the summary dismissal of the complaint, noting that Mid Atlantic was "not seeking [either] to vindicate the rights of its former customers who may have been offered fraudulently low rates" or to recover for injuries "derivative of any losses suffered by its former customers." *Id.* at 264. Rather, "Mid Atlantic

alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor." *Id.* at 263. The court recognized that there may be more than one category of victims to whom a defendants' conduct can proximately cause injury, and that although the customers may have been the most direct victims of the defendants' alleged frauds, Mid Atlantic "claim[ed] distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match [the defendants'] fraudulent ones." *Id.* at 264.

> . . . Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, [the individual defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers).

Id. at 263.

The *Mid Atlantic* holding that a civil RICO plaintiff might prevail by establishing that his injury was proximately caused by a defendant's mail frauds that were relied on by a third person is consistent with the view that this Court had adopted in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"). In *LILCO*, the County of Suffolk had asserted a civil RICO claim alleging that defendants Long Island Lighting Company ("LILCO") and its officers committed mail fraud in the course of State Public Service Commission ("PSC") proceedings, inducing the PSC to grant LILCO unwarranted and excessive rate increases. Although we upheld the posttrial dismissal of that claim for lack of proof that the rate increases were in fact caused by the alleged frauds, we plainly accepted the principle that a RICO

claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff. Noting that the "by reason of" phrase in § 1964(c) "requires that there be a causal connection between the prohibited conduct and plaintiff's injury," 907 F.2d at 1311, and citing, *inter alia*, *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969 (S.D.N.Y. 1989) ("*Shaw*"), we stated that

> in the context of this case, which involves RICO mail fraud claims, this means that it was necessary for Suffolk to demonstrate at trial that LILCO's misrepresentations to the PSC were relied upon by the PSC, . . . and that such misrepresentations caused LILCO's rate increases to be granted.

LILCO, 907 F.2d at 1311 (emphases added). Although we ultimately found the trial evidence insufficient, we plainly adopted the principle stated in *Shaw* that "[a] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived," 726 F. Supp. at 973.

Although cases such as *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) ("*Evans*"), *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) ("*Corcoran*"), and *Metromedia Co. v. Fugazy*, 983 F.2d 350 (2d Cir. 1992) ("*Metromedia*"), *cert. denied*, 508 U.S. 952, 113 S. Ct. 2445, 124 L. Ed. 2d 662 (1993), have sometimes been cited for the proposition that a civil RICO claim based on mail or wire fraud cannot be established absent proof that the plaintiff itself relied on the misrepresentation, *see, e.g.*, *Corcoran*, 886 F.2d at 21 (discussing a possible need for "convergence of the deceived and the injured"), none of those cases held that the plaintiff's own reliance was required. The *Evans* and

Corcoran cases, which were decided under the then-prevailing *McNally* principle that fraudulent mailings did not violate § 1341 unless the scheme was designed to deprive the victim of money or property, *see McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), superseded by statute, 18 U.S.C. § 1346, discussed the convergence theory but did not turn on reliance at all. They held that the government in *Evans* and the plaintiff New York State Superintendent of Insurance in *Corcoran* could not show that they had been deprived of money or property and hence had not even alleged RICO predicate acts. And in *Metromedia*, we stated that "the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on," 983 F.2d at 368 (emphasis added), without suggesting a limitation as to what entity's reliance would suffice, and we cited *LILCO*, 907 F.2d at 1311, which, as discussed above, plainly indicated that a plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether it was the plaintiff or a third party that was deceived. This Court has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the fraud.

The principle that a plaintiff who is injured as a proximate result of RICO predicate acts of fraud need not prove his own reliance, rather than that of a third party, was also approved in our discussion in *American Express*, in which we ruled that American Express shareholders lacked standing to bring derivative civil RICO claims for losses the company incurred in connection with its mail fraud, wire fraud, and bribery-based efforts to defame Safra. Although Safra himself plainly could not have relied on the frauds, we stated that

> if appellants are correct that [individual defendants] violated RICO by defaming Safra, then Safra, as the

> target and victim of the scheme, could sue [them] under RICO and recover treble damages for injuries to his "business or property." *See* 18 U.S.C. § 1964(c).

American Express, 39 F.3d at 401.

In dismissing Ideal's complaint in the present case on the ground that a civil RICO plaintiff who alleges predicate acts of mail or wire fraud has not adequately pleaded transaction causation unless he has alleged that he himself relied on the fraudulent communications, the district court instead relied principally on our decisions in *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-72 (2d Cir. 1999), and *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995). Although those cases contained such language, that language was used in the context of claims brought by plaintiffs who themselves were parties to the transactions that they claimed had been fraudulently induced. In such cases, i.e., where the plaintiff alleges that he was the person deceived, the transaction causation test is not an independent standing requirement but is merely shorthand for part of the normal causation analysis. *Moore* and *Powers* did not deal with circumstances such as those here, in which a plaintiff claims to have been directly harmed by means of a fraud perpetrated on another person, and their statements that the plaintiff must show his own reliance do not control the proximate cause analysis here.

Rather, the principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a

civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

In the present case, Ideal alleged facts sufficient to show that its claimed loss of business was proximately caused by defendants' operation of National's stores through a pattern of racketeering activity. According to the complaint, described in Parts I.A. and B. above, defendants' "cash, no tax" scheme was implemented for the purpose of diverting customers from Ideal, which collected the sales taxes required by law, to National, which did not. Given that Ideal and National sell substantially the same products and that their retail stores are but minutes apart, the lower bottom-line cost available to cash purchasers from National as a result of not paying sales tax influenced some customers to purchase from National rather than from Ideal.

Defendants' mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the "cash, no tax" scheme, for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. The principal intended victim of the scheme was Ideal, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that Ideal, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

2. Investing Racketeering Income in Violation of § 1962(a)

Given the facts alleged in the complaint, we also conclude that Ideal has standing to assert its § 1962(a) claim. A plaintiff may state a civil RICO claim for violation of subsection (a) by alleging that a defendant has received "income derived, directly or indirectly, from a pattern of racketeering activity" and has "use[d] or invest[ed]" any part of that income "directly or indirectly" in an enterprise engaged in interstate commerce, 18 U.S.C. § 1962(a). Under that section, the complaint "must allege injury 'by reason of' defendants' investment of racketeering income in an enterprise," as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise. *See Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990).

Here, part of the proceeds of defendants' alleged "cash, no tax" scheme may properly be viewed as racketeering income, indirectly derived from their pattern of mail and wire frauds, given that those frauds enabled defendants to avoid paying 8B< percent of those proceeds to the State. And the complaint alleges that defendants used profits gained from the operation of their "cash, no tax" scheme at National's Queens location to fund the opening of their retail outlet in the Bronx near Ideal's outlet in that Borough. The complaint adequately stated a claim on which relief can be granted under § 1964(c) for a violation of § 1962(a).

C. Defendants' Alternative Arguments for Affirmance

We also reject defendants' contentions that the dismissal of the complaint may be upheld on either of two alternative grounds. First, they contend that we should affirm because

the problems of proof inherent in Ideal's theory of causation are intractable, as its business losses may have resulted from any of a number of economic factors unrelated to National's alleged practice of failing to charge and pay sales tax. (*See* Defendants' brief on appeal at 20-22.) The evidentiary difficulty hypothesized by defendants, however, is not a proper basis for a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. *See, e.g., Commercial Cleaning*, 271 F.3d at 382-83; *see also Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (potential difficulty in establishing "chain of causation . . . . is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss").

Second, defendants argue that the judgment of the district court should be affirmed because Ideal failed to allege that defendants' electronic filings were interstate, a jurisdictional element of the wire fraud offense described in § 1343. *See generally Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 243 (2d Cir. 1999) (a § 1343 offense "requires that the defendant communicate by wire in 'interstate or foreign commerce'"; a "purely intrastate communication [is] beyond the statute's reach" (other internal quotation marks omitted)). Defendants argue that because National is located in New York and the allegedly false tax reports were filed within the State, National's electronic tax filings cannot have violated the wire fraud statute. This contention is both substantively and procedurally flawed. As a matter of substance, it is possible for a wire communication whose origin and ultimate destination are within a single state to be routed through another state. *See, e.g., United States v. Davila*, 592 F.2d 1261, 1263 (5th Cir.) (upholding § 1343 wire fraud conviction of a defendant who used Western Union wire transfers to send money between San Antonio and McAllen, Texas, which were routed through Middletown,

Virginia), *reh'g denied*, 597 F.2d 283, *cert. denied*, 444 U.S. 843, 100 S. Ct. 85, 62 L. Ed. 2d 56 (1979); *see also United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) (defendant need not know that its wire communication travels through interstate commerce for § 1343 to be applicable), cert. denied, 402 U.S. 945 91 S. Ct. 1629, 29 L. Ed. 2d 114 (1971). As a matter of procedure, the question of whether Ideal will be able to prove that pertinent wire communications by defendants traveled interstate is a matter for trial, not for resolution on a motion pursuant to Rule 12(b)(6). Further, even if it were clear that defendants' wire transmissions were purely intrastate, that would not warrant dismissal of the complaint, for the complaint alleges not only wire fraud but mail fraud. There is no requirement that mail travel interstate for its sender to violate § 1341. *See, e.g., United States v. Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002).

CONCLUSION

We have considered all of defendant's arguments in support of affirmance and have found them to be without merit. The judgment dismissing the RICO claims is vacated for the reasons stated above. We also vacate the dismissal of the state-law contract claim, over which the district court declined to exercise supplemental jurisdiction because of its dismissal of the RICO claims. The matter is remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 4788 (RMB)

[Filed April 2, 2003]

IDEAL STEEL SUPPLY CORP.,
Plaintiff,

v.

JOSEPH ANZA, VINCENT ANZA and
NATIONAL STEEL SUPPLY, INC.,
Defendants.

RICHARD M. BERMAN, U.S.D.J.

DECISION AND ORDER

I. Background

In this action, filed in June 2002, Ideal Steel Supply Corp. ("Plaintiff" or "Ideal") alleges that National Steel Supply, Inc. ("National") and its owners, Joseph and Vincent Anza (collectively, "Defendants"), engaged in a "racketeering" scheme in violation of 18 U.S.C. §§ 1962(a) and (c)("RICO"). Ideal's amended complaint also includes a state

law breach of contract claim. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) and 9(b).

The Court treats the following allegations in the amended complaint ("AC") as true for the purposes of this motion. *See Piccone v. Bd. of Directors of Doctors Hosp.*, 97 Civ. 8182, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *1 (S.D.N.Y. Aug. 28, 2000).

Ideal and National distribute and sell steel mill products and related hardware, supplies, and services, including steel bars and sheets, in a "lumber yard" setting to ornamental ironworkers, small steel fabricators, and do-it-yourself homeowners. (ACPP2, 16.) Ideal and National each have two store locations, one in the Bronx and one in Jamaica, Queens. (ACPP3, 19-20.) Each one of Ideal's stores is located within a few minutes of each of National's stores. (ACPP19-20.)

National is Ideal's principal competitor in New York City for the products it sells. (ACP15.) No other business in the Bronx or Queens sells "the same or a similar comprehensive array of products and services or competes for the same customers." (ACPP3, 16, 19-20.) "As Ideal and National sell at nearby locations similar product lines of generic commodities, they compete principally on the basis of price." (ACPP3, 21.) Demand in the market does not fluctuate based on price, but on the robustness of the construction industry. (ACP22.) Accordingly, Ideal and National can not increase demand by reducing prices or aggressively marketing their products. (ACP22.) Increases in sales at one of the competitor's stores -- if not caused by overall market demand -- generally occurs with concomitant decreases in the other's sales. (ACP22.)

The products Ideal and National sell are taxable at 8.25% unless they fall within one of the New York State sales tax exemptions.[1] (ACPP18, 23.) New York State tax law requires businesses to pay the taxes collected and to submit an account of taxable sales in monthly or quarterly returns. (ACP25.) It is alleged that National does not charge cash-paying customers sales tax (on taxable sales) in violation of New York State sales tax laws. (ACPP4, 27.) Defendants do not report or pay to the New York State Department of Taxation and Finance any sales tax on the sales for which Defendants illegally ignore sales tax. (ACPP4, 28.) Since 1998 and continuing to today, National has filed (either by U.S. mail or electronically) fraudulent sales tax returns with the New York State Department of Taxation and Finance. (ACPP5, 29, 44, 47.)The returns misrepresent the amount of taxable sales at National and the amount of sales tax National collects each reporting period. (ACP29.)

Defendants' "cash, no tax" scheme directly injures Ideal because Ideal cannot charge its customers 8.25% more than National and still compete on price, the principal factor in choosing between Ideal and National. (ACPP6, 48.) "National offers customers a substantial savings over Ideal because National does not charge, collect or pay the required sales tax of 8 1/4% on non-exempt cash sales, thereby reducing the total price paid by customers making cash purchases at National, without reducing National's profit margin." (ACPP6, 32, 49.) As a result of Defendants' "cash, no tax" scheme, Ideal has experienced a decrease in taxable cash sales. (ACPP6, 36, 50.) For example, "Ideal experienced a

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[1] The combined New York State and City sales tax equals 8.25%. See N.Y. Tax Law §§ 1105, 1107, 1109 (McKinney Supp. 2003).

steep drop in taxable cash sales after National opened its Bronx facility that was disproportionate to the effect that National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate." (ACP35.) The effect of Defendants' "cash, no tax" scheme "is to create an improper competitive advantage for National over Ideal." (ACPP32, 49.)

"By filing, or directing National to file, by U.S. mail New York State sales tax returns that they knew to be fraudulent on a quarterly (or monthly) basis for each reporting period at least since 1998 if not before, defendants Joseph and Vincent Anza on each occasion violated the federal mail fraud statute (18 U.S.C. § 1341). Each violation constitutes a predicate act of racketeering under 18 U.S.C. § 1961(1)(B). To the extent that any of the false returns are filed with the State electronically, defendants also violated 18 U.S.C. § 1343. Each violation of this statute is a predicate act of racketeering."[2] (ACPP45-46; *see* ACP5.) Ideal claims that this "cash, no tax" scheme constitutes a pattern of RICO racketeering, punishable under 18 U.S.C. § 1962(c), (ACPP7, 45-51); that Defendants (re)invest the money from the alleged RICO scheme in National's Bronx location, punishable under 18 U.S.C. § 1962(a), (ACPP55-58); and that the scheme breaches a settlement agreement the parties executed in a 1997 litigation, wherein National and Ideal agreed, among other things, not to interfere with each others'

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[2] *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985)("Mail fraud qualifies as a racketeering activity under the statute, 18 U.S.C. § 1961(1), and mailing fraudulent state sales tax returns qualifies as mail fraud."); *see also Porcelli v. United States*, 964 F.2d 1306, 1307 (2d Cir. 1992).

"business activities other than through legitimate and proper competition."[3] (ACPP8, 60-67.) **For the reasons set forth below, the Court grants Defendants' motion to dismiss.**

II. Standard of Review

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see McLaughlin v. Anderson*, 962 F.2d 187, 190 (2d Cir. 1992). In resolving a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001); *McLaughlin*, 962 F.2d at 190. In other words, the burden on the movant is very substantial, as the issue before the Court in a Rule 12(b)(6) motion "is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995)(quoting *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1976) (*per curiam*)). While "the well-pleaded material

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[3] "In 1994, National and other businesses owned and operated by Joseph and Vincent Anza filed a lawsuit against Ideal seeking damages for Ideal's alleged interference with National's customers and employees. *National Security Gates, Inc., et al. v. Vincent Brancato and Sons, Inc., et al.*, New York State Supreme Court, Queens County, Index No. 014536/94." (ACP60.) "That lawsuit was discontinued pursuant to a 'Stipulation of Settlement' dated January 14, 1997." (ACP61.)

allegations of the complaint are taken as admitted... conclusions of law or unwarranted deductions of fact are not admitted." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)(internal quotation omitted). Where, as here, a complaint alleges (mail and/or wire) fraud, the pleading requirements of Fed. R. Civ. P. 9(b) apply. *Id.*; *McLaughlin*, 962 F.2d at 191.

"Civil RICO is an unusually potent weapon--the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO claim ... has almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996)(citations omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997).

III. Analysis

Along with the amended complaint, the Court has reviewed the Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated October 11, 2002 ("Defs. Br."); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated November 8, 2002 ("Pl. Br."); and the Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated November 19, 2002.[4]

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[4] Oral argument is not needed. *See* Letter from Counsel for Defendant, dated Nov. 19, 2002 ("Both sides have agreed that the parties are content to leave the question of oral argument to the Court.")

The Defendants argue, in support of their motion, that (1) Plaintiff lacks standing to bring a RICO claim because Plaintiff does not allege "proximate cause," Def. Br. at 6 ("National's alleged avoidance of New York State sales tax could only directly affect New York State tax collections, not Ideal's business."); (2) Plaintiff has failed to plead the allegations of mail and wire fraud with particularity as required under Fed. R. Civ. P. 9(b); and (3) the Court must dismiss Plaintiff's supplemental state law claims if the Court dismisses the RICO claims.

Plaintiff responds that proximate cause exists under applicable case law. Plaintiff also argues that the amended complaint, fairly read, alleges fraud with sufficient particularity, and, where it lacks particularity, "the relevant facts are peculiarly within the [Defendants'] knowledge." Pl. Br. at 21-22. Plaintiff concedes that if the Court dismisses the RICO claims "the basis for supplemental jurisdiction is attenuated," but adds that a dismissal of the state-law claims would not be on the merits. Pl. Br. at 25 n.12.

"RICO grants standing to pursue a civil damages remedy to 'any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].' 18 U.S.C. § 1964(c). In order to bring suit under § 1964(c), a plaintiff must plead (1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation." *Commercial Cleaning*, 271 F.3d at 380 (alteration in original). Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,'

meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. Painewebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 97 CIV. 9380, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), *aff'd* 00-7356, 242 F.3d 366, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995); *Macomber v. Travelers Prop. Cas. Corp.*, 3:98-CV-01060, 1999 U.S. Dist. LEXIS 2707, 1999 WL 118005, at *2 (D. Conn. Jan. 28, 1999). *See generally* Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: Civil & Criminal Law & Strategy, § 1.07[6], at 1-128 (2002)("The Second Circuit ... requires that in the context of predicate acts grounded in fraud the plaintiff must prove both transaction causation and loss causation.").

Ideal has not plead transaction causation. Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged -- indeed, can not allege -- that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail. *See Odyssey*, 85 F. Supp. 2d at 302 (holding that "to show transaction causation, ... plaintiff must show that it relied on defendant's omission."); *Mezzonen*, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5-*6; *Moore*, 189 F.3d at 169-71. n5

n5 *See also Ficcone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 (holding that plaintiff "failed to plead sufficient facts demonstrating either that he relied on defendants' fraudulent misrepresentations or that such reliance caused him injury"); *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 925 F. Supp. 162, 164 (S.D.N.Y. 1996)(denying motion to reconsider holding that "in alleging mail or wire fraud as predicate acts in a civil RICO complaint, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the reliance was the cause of the injury"); *Miller v. Helmsley*, 745 F. Supp. 932, 940 n.5 (S.D.N.Y. 1990)(siding, in dicta, with cases holding that plaintiff must allege it relied on fraud); *accord Corcoran v. American Plain Corp.*, 886 F.2d 16, 19-20 (2d Cir. 1989); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988). Other courts appear to have held that third-party reliance is sufficient. *See, e.g., Sterling Interiors Group v. Haworth, Inc.*, 94 Civ. 9216, 1996 U.S. Dist. LEXIS 13908, 1996 WL 537482, at *3 (S.D.N.Y. Sept. 23, 1996); *Trautz v. Weisman*, 819 F. Supp. 282, 286 (S.D.N.Y. 1993); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969, 973 (S.D.N.Y. 1989); *see also Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990).

Plaintiff's reliance on *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001)("*Commercial Cleaning*") to establish causation is not compelling. In *Commercial Cleaning*, reliance was not an issue -- the plaintiff based its RICO complaint upon a violation of the Immigration and Nationality Act, 8 U.S.C. § 1324(a). *Commercial Cleaning*, 271 F.3d at 378, 380 (alleging that defendant "engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of Section 274 of the Immigration and Nationality Act"). Ideal, on the other hand, bases its RICO claim on mail and

wire fraud -- and that is a critical difference. *See Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 ("If one alleges predicate acts of mail fraud, as [plaintiff] does, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the reliance was the cause of the injury.").

"We must be content with making our best efforts to make recovery commensurate with the statutory wrong and to set out 'our more or less inadequately expressed ideas of what justice demands' in each case." *Sperber v. Boesky*, 849 F.2d 60, 66 (2d Cir. 1988)(quoting W. Page Keeton, et al., Prosser & Keeton on the Law of Torts 264 (5th ed. 1984)). The Court holds that Plaintiff can not, as a matter of law, allege that it relied on Defendants' alleged misrepresentations to the New York State Department of Taxation and Finance. *See, e.g., Odyssey*, 85 F. Supp. 2d at 302; *see also Moore*, 189 F.3d at 169-70. Consequently, Plaintiff can not satisfy the pleading requirements for its RICO claims. *See Sperber*, 849 F.2d at 60 (dismissing complaint alleging violations of 1962(a) through (d) for failure to plead causation adequately); *Miller*, 745 F. Supp. at 935-40 (same).[5]

Because the Court dismisses Plaintiff's federal (RICO) claims, the Court also dismisses the state law breach of contract claim (without prejudice). *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 130 (2d

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[5] Because the Court dismisses Plaintiff's RICO claims on causation grounds, the Court need not address Defendants' alternative argument that the pleading fails to comply with the particularity requirements of Fed. R. Civ. P. 9(b). *See Barr Labs., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 116 n.6 (E.D.N.Y. 1993); *Miller*, 745 F. Supp. at 934.

Cir. 2003)("In most circumstances, a district court should decline supplemental jurisdiction if all federal claims have been dismissed at the pleading stage."); *Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *7 (dismissing state law claims without prejudice to refiling in state court); *see* Pl. Br. at 25 n.12.

IV. Conclusion and Order

For the reasons stated, the Court grants Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court respectfully requests that the Clerk close this case.

Dated: April 1, 2003

/s/ _____
RICHARD M. BERMAN, U.S.D.J.

APPENDIX C

STATUTORY PROVISIONS INVOLVED
18 USC §§ 1961-1968

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USC § 1961 (2004)

§ 1961. Definitions

As used in this chapter [18 USC §§ 1961 et seq.]--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section

1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice [influencing or injuring officer or juror generally]), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons)[.], section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate

transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 [8 USC § 1324] (relating to bringing in and harboring certain aliens), section 277 [8 USC § 1327] (relating to aiding or assisting certain aliens to enter the United States), or section 278 [8 USC § 1328] (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and

charged with the duty of enforcing or carrying into effect this chapter [18 USC §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USC §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USC §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USC §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USC §§ 1961 et seq.] either the investigative provisions of this chapter [18 USC §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 USC § 1962 (2004)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 USC § 1963 (2004)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any--

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is

sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing

requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of

the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter [18 USC §§ 1961 et seq.], or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter [18 USC §§ 1961 et seq.];

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to--

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter [18 USC §§ 1961 et seq.];

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter [18 USC §§ 1961 et seq.].

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter [18 USC §§ 1961 et seq.] by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any

person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 USC § 1964 (2004)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained

in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USC §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 USC § 1965 (2004)

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter [18 USC §§ 1961 et seq.] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter [18 USC §§ 1961 et seq.] in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial

district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter [18 USC §§ 1961 et seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 USC § 1966 (2004)

§ 1966. Expedition of actions

In any civil action instituted under this chapter [18 USC §§ 1961 et seq.] by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

18 USC § 1967 (2004)

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter [18 USC §§ 1961 et seq.] the proceedings may be open or closed to the

public at the discretion of the court after consideration of the rights of affected persons.

18 USC § 1968 (2004)

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by

a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material

available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter [18 USC §§ 1961 et seq.]. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter [18 USC §§ 1961 et seq.], the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall

return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter [18 USC §§ 1961 et seq.], and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by

the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

(2)

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In The Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, and NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) 1

Respondent Ideal Steel Supply Corporation submits that this is not a case in which the Court should grant the petition for writ of *certiorari*. The Court has conclusively addressed the core issue raised in the petition so that this appeal simply involves an application of settled law to the particular factual averments of the case. Because the controlling law is settled, the claim of a circuit split does not involve a divergence of doctrine but application of settled law to particular facts. In fact, the decision below, far from creating a split, builds on a solid foundation of case law. Furthermore, to buttress their claim of a split among the circuits, petitioners have raised a wholly new issue – standing – not raised in the court of appeals.

There is an additional reason why no writ should issue. This case comes before the Court on a decision reversing dismissal of the complaint for failure to state a claim on which relief can be granted. Thus, the review is interlocutory as the case goes forward in the district court. Hence, the posture of the case below also counsels against consideration without a concrete record developed through discovery and trial. Simply put, this case is not a good vehicle for resolving a split among the circuits even if one existed.

1. The Court Has Settled the Law of Proximate Cause Under RICO.

Petitioners concede, as they must, that the Court settled the "basic approach" for proximate cause under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The Court said that it used the term proximate cause to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." 503 U.S. at 268. The Court observed that it could not

lay down specific requirements for all factual situations that might arise with respect to proximate cause under RICO. *Id.* at 272 n.20. Instead, the Court left the development of the law within the general requirements of *Holmes* to the lower federal courts. *Id.*

Thus, the general rule of proximate cause under RICO is a matter of settled law. The Court has recognized that the application of the rule of *Holmes* in a particular case is an enquiry that depends on the particular facts and circumstances in each case. In view of the Court's opinion in *Holmes*, it should come as no surprise that different results may arise from the same rule applied to different facts. In fact, the results raised by petitioners as constituting a conflict are readily explained by their arising from different facts.

2. Petitioners Have Not Shown A Significant Split Between the Circuits on the Issue of Proximate Cause under RICO for Competitor Injury.

When they posit the need for intervention of the Court in the supposed split in the circuits, petitioners seek to come within the provisions of Sup.Ct.R. 10(a), that a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. What petitioners do is to mix and match issues to suggest a conflict, where proper analysis shows that the courts of appeals are largely if not wholly in accord.

In their attempt to show a split, petitioners move back and forth between two legal issues. The more general issue is the requirement for reliance on the misrepresentations in mail fraud to meet the requirement for proximate cause when such mail fraud is a predicate act under RICO. The federal courts have generally held that such reliance is required. The

more specific issue, and the one raised by the case here, is whether reliance by the plaintiff is required when plaintiff is the target of the fraudulent scheme and suffers direct injury by reason of reliance by third parties to whom the misrepresentations were directed, but on which it did not itself rely. Here, Ideal Steel averred that it was the target of a scheme to defraud by National Steel Supply Corporation's not charging applicable sales taxes and filing false sales tax returns, enabling National to offer customers lower overall prices on commodity-type goods and compete unfairly against Ideal Steel in a two-company, price-sensitive market. In this more specialized case, the courts have almost uniformly held that third-party reliance is sufficient if the plaintiff has suffered direct injury as a result.

The court below followed the decision of the Fourth Circuit in *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994). In *Mid Atlantic*, a competitor made fraudulent mailings soliciting customers of the plaintiff by offering artificially low rates. The actual rates were not as low as represented. The *Mid Atlantic* court rejected the argument that the plaintiff was not a victim because it did not receive the fraudulent mailings. Instead, the court held that Mid Atlantic had alleged a distinct and independent injury that was caused directly to it, and was not asserting a claim derivative of losses asserted by its former customers. On the authority of *Mid Atlantic* as well as several Second Circuit cases, the court below held that Ideal Steel had properly alleged an injury proximately caused by defendants' mail frauds that were relied upon by a third party, whose reliance was critical to the scheme's success. *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 261-62 (2d Cir. 2004).

In almost every case involving this kind of claim, the courts of appeals have reached that same conclusion as the court below. The application of the general requirement of

reliance to the special case of competitor injury is best illustrated in *Summit Properties, Inc. v. Hoechst-Celanese, Inc.*, 214 F.3d 556, 561 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001). In *Summit*, the Fifth Circuit held that there was a general requirement for reliance where the RICO predicate acts were mail fraud, but stated that there was an exception when a competitor was the target of a fraudulent scheme accomplished by defrauding others, as when a competitor lured customers away by a fraud directed at plaintiff's customers. This is consistent with the decision below and with the Fourth Circuit's decision in *Mid Atlantic*.

On the other side of the alleged split, the petitioners place the Sixth Circuit, *VanDenBroeck v. CommonPoint Mort. Co.*, 210 F.3d 696, 701 (6th Cir. 2000), and the Eleventh. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir.), *cert. denied*, 537 U.S. 884 (2002). Petition, at 6. But *VanDenBroeck v. CommonPoint Mort. Co.* is not a case involving the kind of targeted scheme found in *Mid Atlantic* or the case below. *VanDenBroeck* was a class action by borrowers over undisclosed fees by a home mortgage lender. The cases on which the *VanDenBrock* court relied, *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 390 (6th Cir. 1996), a consumer finance case involving an auto loan, and *Bender v. Southland Corp.*, 749 F.2d 1205, 1215-16 (6th Cir. 1984), dealing with claims of coercion of franchisees, were not competitor cases either. *Bender*, of course, antedates *Holmes*.

Similarly, the Eleventh Circuit's decision in *Sikes v. Teleline, Inc.*, is also not a case of a fraudulent scheme accomplished by defrauding others. The *Sikes* court cites *Andrews v. American Tel. & Tel., Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996), and *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). *Sikes* and *Andrews* were similar cases involving customer class actions against long distance telephone companies that provided "900" numbers for

companies offering games of chance. The issue of reliance arose in connection with the propriety of certifying the case as a class action in which individual reliance would be an issue. *Pelletier* was a securities fraud case brought directly by the alleged victim of the misrepresentation. None of these cases present a common or even similar fact pattern to the case below or *Mid Atlantic*.

Then petitioners cite to *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004), because, petitioners say, that case cites examples of the split between the circuits. Petition, at 6. However, the court in *Poulos* was addressing the general requirement of reliance as an element of causation, not the more specialized case of targeted injury through third-party reliance. But this supposed split on the general issue of reliance is itself elusive. The only case that *Poulos* cites as not requiring reliance is *Systems Mgt., Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002). The *Loiselle* court said that reliance was the most obvious way that mail fraud can cause harm, but that it was not the only way. But the actual holding in the case was that there was no RICO violation because there was no pattern of racketeering activity. *Id.* at 106.

A general requirement for reliance is of course broad enough to include third-party reliance. As the court below noted, in *County of Suffolk v. Long Island Lighting Co. ("LILCO")*, 907 F.2d 1295, 1311 (2d Cir. 1990), one of the cases cited in *Poulos*, while reliance was required, "we plainly accepted the principle that a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff." *Ideal Steel*, 373 F.3d at 262.[1]

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[1] This is also the law in New York. *Ruffing v. Union Carbide Corp.*, 308 A.D.2d 526, 528, 764 N.Y.S.2d 462, 465 (2003). "[T]he holding of Holmes is no more than that common law ideas about proximate causation inform the understanding of RICO." *Israel Travel*

Similarly, the court in *Mid Atlantic* correctly refrained from reading the Fourth Circuit case cited in *Poulos*, *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n. 10 (4th Cir. 1988), *overruled on other grounds*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 506, 531 (1996), as imposing any invariable requirement of victim reliance. Instead, the court said, "We did not ... intend to establish a rule that only injuries to the immediate victim of a predicate act would satisfy the 'by reason of' requirement of [18 U.S.C.] § 1964(c)." *Mid Atlantic*, 18 F.3d at 263.

Nothing in *Poulos* suggests that there is any split among the circuits on whether third-party reliance is sufficient where a plaintiff shows that it is the target of the fraudulent scheme and is directly injured by it. The alleged split is the result of petitioners' lack of clarity with respect to what the "important matter" under Sup.Ct.R. 10(a) in fact is.

When the issue of reliance generally is distinguished from the specialized case of injury to a target of the scheme through third-party reliance at issue here, the purported split largely evaporates. The court below followed the Fourth Circuit decision in *Mid Atlantic* and the Second Circuit's decision in *LILCO*, 907 F.2d at 1311. When it reviewed a case alleging injury based on third-party reliance, the Fifth Circuit, citing *Mid Atlantic* and true to its dictum in *Summit*, also held that the facts stated a claim under RICO. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001).

While petitioners devote the largest part of their brief dealing with any single case to *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996), they concede

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Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996).

that the *Israel* court accepted and followed the Fourth Circuit's decision in *Mid Atlantic Telecom*, expressly stating that it did so to avoid creating a conflict among the circuits. *Israel*, 61 F.3d at 1257.

Although the Sixth and Eleventh Circuits require reliance generally, the Eleventh Circuit simply has not spoken to the issue of targeted injury based on third-party reliance that the Fifth Circuit highlighted in *Summit* and approved in *Procter & Gamble*, and that the Second and Fourth Circuits recognized in this case and *LILCO* and in *Mid Atlantic* respectively.

This leaves one case, *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994), arguably in conflict. *Central* involved claims that the defendants engaged in mail and wire fraud in invading plaintiff's exclusive marketing territory and competing unfairly with plaintiff. The *Central* court, relying on *Bender*, *supra*, upheld summary judgment for the defendants because plaintiff was required to show, and could not show, that the defendant made misrepresentations directly to the plaintiff. *Central*, 5 F.3d at 184. But *Central* was decided more than a decade ago and only eighteen months after *Holmes*, and this Court denied *certiorari*. Since that time, the case law on this issue has followed the Fourth Circuit's decision in *Mid Atlantic Telecom* rather than *Central*, as did the court below.

Thus, the trend of the case law is clear. The decision below did not open up or widen any split. Rather than a split, the case law shows an emerging consensus. *Mid Atlantic Telecom*, the case followed by the court below, represents the majority position. Petitioners have failed to show that there is a split in the circuits on an important matter that requires this Court's attention.

3. Petitioners' "Standing" Issue was Never Raised Below.

The thinness of the case for a circuit split is perhaps best illustrated by petitioners' need to raise a wholly new issue in their petition, which petitioners call "standing". *See* Petition, at 8-9. In fact, the referenced part of *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d at 1257-58, deals with the requirement under *Holmes* that the plaintiff's injury be direct and not derivative. In this case, the injury was direct and standing was not an issue that was raised, either at the motion to dismiss stage in the district court or on appeal.

There is a longstanding rule that the Court will not consider issues raised for the first time in a petition for writ of certiorari. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). If the issue is in fact one of statutory standing, it has not been raised or developed in this case.

In fact, the Seventh Circuit's analysis in *Israel,* 61 F.3d at 1258, merely held that, on the facts before it, the seller plaintiff's injury was derivative, because its customers, not it, were the victims of the fraud. In the case below, the court of appeals held that Ideal Steel's injury was direct, because it was both the target and the victim of the fraud. *Ideal Steel*, 373 F.3d at 264. This is a natural – and appropriate -- result of different facts.

But even in its holding that the injury in the case before it was indirect, and thus did not satisfy *Holmes*, the Seventh Circuit did not conclude that its ruling required departure from the precedent of *Mid Atlantic*. Instead, the court followed the ruling of the Ninth Circuit in *Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 317, 405-06 (9th Cir. 1991), saying: "We are no more inclined to create a conflict on this question than we were on the *Mid Atlantic* issue …" 61 F.3d at 1258. Clearly sensitive to the

issue of conflict among the circuits, the Seventh Circuit did not perceive the conflict that petitioners ask the Court conclude the decision below raises here.

4. There Is No Conflict Between RICO and the Antitrust Laws.

Petitioners next suggest another theory that they did not urge below: that the decision in this case creates a conflict between RICO and the antitrust laws, and threatens to turn RICO into a federal law of unfair competition. But as the Seventh Circuit noted in *Israel*, "*Holmes* explicitly refrained from importing a theory akin to the antitrust-injury doctrine into the law of RICO." *Israel*, 61 F.3d at 1257.

Moreover, *Mid Atlantic* was decided in 1994 on the same principles as the case below. Petitioners cite no court decision or commentary that discusses or even posits the conflict asserted in the petition. If there were a conflict between RICO and the antitrust laws, no one seems to have noticed, and, in any event, such conflict would be a matter for Congress, not the federal courts.

5. The Nature of the Proximate Cause Enquiry Makes it Unsuitable for Disposition as a Matter of Law on the Pleadings.

Because the court of appeals reversed the district court's dismissal, the case below is proceeding in the district court and this petition is interlocutory. Consideration of this case at this time would violate the principle that there not be piecemeal review of the steps toward a final judgment in which they would merge. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 n.3 (1983).

The present posture of this case underscores its unsuitable nature for consideration by the Court. This case

comes before the Court on a ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). The court of appeals reversed the dismissal and remanded the case for further proceedings. *Ideal Steel*, 373 F.3d at 265. There is no stay in effect and the parties are engaged in extensive discovery in the district court. The present case management order requires discovery to be completed by November 26, 2004: the district court has scheduled a meditation session for a few days later.[2]

This Court has recognized that the issue of proximate cause under RICO requires an enquiry informed by the particular concerns identified by the Court. *Holmes*, 503 U.S. at 272 n.20. There has been as yet no concrete development of the facts. As the Court has recognized, piecemeal interlocutory review is disfavored because it involves the Court in reviewing matters that may well be subject to future review after development through discovery and trial. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 315-17 (1995). In addition, on issues in which the facts play a major role, decision as a matter of law on the pleadings is disfavored. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002).

CONCLUSION

The petitioners have failed to present an issue that merits the Court's attention, either as a significant question of federal law on which the circuits are in fact divided, or, with respect to the standing issue, one which was raised and decided in the courts below. Furthermore, interlocutory rulings of the sort present here are disfavored as vehicles for resolving other important matters. For these reasons, respondent prays that the petition for writ of *certiorari* will be denied.

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2 The parties have requested a short extension of this schedule.

Respectfully Submitted,

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Dated: October 29, 2004

No. 04-433

In the Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Certiorari filed September 29, 2004
Petition for Certiorari granted November 28, 2005

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RELEVANT DOCKET ENTRIES

United States District Court
for the Southern District of New York
Civil Docket for Case No. 1:02-cv-04788-RMB

Date Filed	#	Docket Text
06/20/2002	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $150.00 RECEIPT # 442616. (jol) (Entered: 06/24/2002)
10/11/2002	5	NOTICE OF MOTION (FILED ON SERVICE DATE) by National Steel, Inc. for an order purs. to Rule 12(b)(6) and Rule 9(b) dismissing this action. No Return Date indicated. (db) (Entered: 11/01/2002)
10/21/2002	7	DECLARATION of Richard L. Huffman by National Steel, Inc. in support Re: [5-1] motion for an order purs. to Rule 12(b)(6) and Rule 9(b) dismissing this action. (db) (Entered: 11/01/2002)

04/02/2003	11	DECISION AND ORDER; granting [5-1] motion for an order purs. to Rule 12(b)(6) and Rule 9(b) dismissing this action; the Court respectfully request that the Clerk close this case. (signed by Judge Richard M. Berman); forwarded this document to the Judgment Clerk. (pl) (Entered: 04/02/2003)
04/07/2003	12	JUDGMENT, that for the reasons stated in the Court's Decision and Order dated 4/1/03, defts' motion to dismiss is granted; accordingly, the case is closed (signed by J. Michael McMahon, Clerk of Court); Mailed copies and notice of right to appeal. Entered On Docket: 4/8/03. (cd) (Entered: 04/08/2003)
04/18/2003	13	NOTICE OF APPEAL by Ideal Steel Supply from [12-1] judgment order, [11-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: Richard L. Huffman. $105.00 Appeal filing fee paid 4/18/03 on receipt # E 471457. (dt) (Entered: 04/18/2003)

08/11/2003	15	AMENDED COMPLAINT by Ideal Steel Supply (Answer due 8/21/03 for National Steel, Inc., for Vincent Anza, for Joseph Anza) amending [1-1] complaint; Summons issued. (dle) (Entered: 09/04/2003)
08/12/2003	19	MANDATE of USCA (Certified Copy) as to [13] Notice of Appeal filed by Ideal Steel Supply Corp. USCA Case number 03-7381. Ordered, Adjudged and Decreed that the judgment of the District Court is VACATED and REMANDED in accordance with the opinion of this court. MACKECHNIE, Clerk USCA. Issued as Mandate: 7/27/04. (pr,) (Entered: 08/02/2004)

United States Court of Appeals
for the Second Circuit
Docket No. 03-7381-cv

9/9/03	Appellant Ideal Steel Supply C brief FILED with proof of service. [DT]
9/9/03	Appellant Ideal Steel Supply C joint appendix filed w/pfs. Number of volumes: 1. [DT]
10/9/03	Appellee Joseph Anza, Appellee Vincent Anza, Appellee National Steel Suppl brief filed with proof of service. [DT]
11/28/03	Appellant Ideal Steel Supply C reply brief filed with proof of service. [DT]
12/16/03	Case heard before WALKER, CH.J; KEARSE, CABRANES, C.JJ . (TAPE: CD date: 12/16/03) [DT]
7/2/04	Judgment of the district court is Vacated and Remanded by published signed opinion filed. (ALK) [EA]
7/2/04	Judgment filed. [EA]
7/27/04	Judgment MANDATE ISSUED. CLOSED [AM]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed September 13, 2002]

02 CIV. 4788 (RMB)

IDEAL STEEL SUPPLY CORP.,	)
Plaintiff,	)
	)
v.	)
	)
JOSEPH ANZA, VINCENT ANZA	)
and NATIONAL STEEL SUPPLY, INC.,	)
Defendants.	)
	)

AMENDED COMPLAINT

PLAINTIFF DEMANDS A JURY TRIAL

Plaintiff Ideal Steel Supply Corp. ("Ideal") by its attorneys, Ross & Hardies, for its complaint alleges as follows:

Preliminary Statement

1. Upon information and belief, defendant National Steel Supply, Inc. ("National") and its owners, defendants Joseph and Vincent Anza, have engaged in an unlawful racketeering scheme, the intent and direct effect of which is to cause Ideal, National's principal competitor, to lose a substantial part of its business to National.

2. Ideal and National each distribute and sell various forms of steel mill products and related hardware, supplies and services in a "lumber yard" setting to ornamental ironworkers, small steel fabricators and do-it-yourself homeowners. They compete in the same market to sell the same products and services to the same customer base.

3. Ideal and National each have two locations in the Bronx and in Jamaica, New York, a few minutes' drive from each other. No other businesses in the Bronx or Queens sell the same or a similar comprehensive array of products and services or compete for the same customers. As Ideal and National sell at nearby locations similar product lines of generic commodities, they compete principally on the basis of price.

4. Although Ideal and National are alike in many ways, National differs from Ideal in the following essential respect: Upon information and belief, by direction and control of its owners, Joseph and Vincent Anza, National, in violation of New York State tax laws, does not charge or collect sales tax on taxable sales from its cash-paying non-exempt customers, and does not report these sales or pay the required sales tax on them to the New York State Department of Taxation and Finance.

5. Upon information and belief: To further their "cash, no tax" scheme, defendants knowingly must and do make, on a regular basis, fraudulent misrepresentations to government agencies regarding National's taxable sales and the resulting sales tax owed. National regularly and repeatedly files, by U.S. mail or electronically, false safes tax returns to the New York State Department of Taxation and Finance, returns which deliberately understate National's taxable cash sales and the sales taxes collected and due on National's taxable

cash sales. These false filings violate the federal mail fraud statutes as well as state tax laws.

6. Defendants' unlawful "cash, no tax" racketeering scheme directly injures Ideal. National offers customers a substantial savings over Ideal because National does not charge, collect or pay the required sales tax of 8¼% on non-exempt cash sales, thereby reducing the total price paid by customers making cash purchases at National, without reducing National's profit margin. Since price competition is the principal way customers choose between Ideal and National, National's unlawful price advantage has caused Ideal to lose business to National and enabled National to gain sales and market share at Ideal's expense.

7. As set forth more fully below, the "cash, no tax" scheme constitutes a pattern of racketeering for which defendants are each civilly liable for treble damages under 18 U.S.C. § 1964(c).

8. Defendants' scheme further constitutes a material breach of a stipulation that several of the parties entered into in 1997 to settle litigation between them. Defendants agreed not to interfere with plaintiff's business activities "other than through legitimate and proper competition." Defendants' fraudulent and unlawful "cash, no tax" scheme interferes with Ideal's business and is neither legitimate nor proper competition.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1367 and the doctrine of supplemental jurisdiction.

10. This Court has personal jurisdiction over defendants by virtue of their transacting and doing business in this district.

11. Venue is proper under 28 U.S.C. § 1391 as a substantial part of the events giving rise to the claims occurred in this district.

THE PARTIES

12. Plaintiff Ideal Steel Supply Corp. is a New York corporation with places of business in the Bronx and Queens, New York.

13. Defendant National Steel Supply, Inc. is a New York corporation with places of business in the Bronx and Queens, New York.

14. Joseph and Vincent Anza are father and son, each living in Easton, Connecticut, who together own, control and operate National.

FACTS COMMON TO ALL CLAIMS

15. Ideal and National are the principal competitors in New York City for the types of products they each sell.

16. Ideal and National are the only vendors in the Bronx and Queens offering a comprehensive mix of steel mill products (such as steel bars and sheets) and related hardware, supplies and services, to ornamental iron workers and small steel fabricators. The products and services offered by Ideal and by National are virtually the same. Ideal and National each offer their products and services in a "lumber yard" setting, conducting much of their business on a "cash and

carry" basis with no minimum order required, thereby providing convenient, one-stop shopping for the professional ironworkers, small steel fabricators and do-it-yourself homeowners they serve.

17. Ideal and, upon information and belief, National, purchase the steel and other products they sell from manufacturers outside of New York State and sell those products for use in the New York, New Jersey and Connecticut tri-state area. Their customers are located throughout the tri-state area with a concentration in the Bronx and Queens.

18. Sales of products by Ideal and National are taxable unless made on a "resale" basis (i.e., for further taxable sale by a qualified purchaser in the products' original for or after further fabrication). Resale sales are exempt from taxation so long as the purchaser furnishes Ideal or National with the proper documentation from the New York State Department of Taxation and Finance. Sales that are not made on a resale basis may be exempt from taxation if the goods are for use in a job for a tax-exempt entity (such as a school, government building, church or other not-for-profit facility) so long as the purchaser furnishes Ideal or National with the proper documentation mandated by the New York State Department of Taxation and Finance.

19. Ideal and National have each been vendors of steel mill products and related supplies and services at their respective present locations in Jamaica, in the Borough of Queens, New York City, for more than ten years. Ideal is located at 112-17 159th Street. National is located at 145-64 Liberty Avenue, less than a four minute drive from Ideal's location. There are no other vendors in the Borough of Queens that carry the same or a similar comprehensive array

of products and services serving the same customers.

20. Ideal has also maintained a location at 1278 Viele Avenue in the Bronx since November 1996. In or about the summer of 2000, National opened up a Bronx location at 700 Havemeyer Avenue, just eight minutes by automobile from Ideal's Bronx location. There are no other vendors in the Bronx that carry the same or a similar comprehensive array of products and services serving the same customers.

21. Ideal and National compete primarily on the basis of price. The products they each sell consist largely of commodities which are not sold on the basis of brand or manufacturer. In most, if not all, instances, from their customers' perspective, the only significant difference in goods and services purchased from Ideal or National is the total price the customer has to pay for the products.

22. While differences in prices charged by Ideal and National affect customers' decisions to purchase from one or the other, the overall demand for the products offered by Ideal and National is not significantly affected by changes in the prices Ideal and National charge. Rather, the total demand in the market served by Ideal and National is dependent primarily upon economic activity in the real estate and construction businesses and the overall demand, generally, for ornamental security or other ironworks products at a given time. Neither Ideal nor National can substantially increase the overall demand for the products and services they sell by reducing prices or through advertising and other marketing efforts. Therefore, increases in sales by Ideal or by National that do not result from changes in overall market demand will generally come at the expense of the other's sales.

23. Under New York State Tax Law (the "Tax Law"),

sales to end users by Ideal and by National are subject to state and local sales tax, currently 8¼ % of the selling price, except that sales to purchasers with valid resale certificates are exempt from the sales tax. All sales are presumed by law to be taxable unless a valid resale or exempt certificate is furnished by the purchaser to Ideal or National within 90 days of purchase.

24. National and Ideal are obligated under Tax Law §§ 1101, 1105, and 1131-37 to advise each customer of the amount of tax due on a sale and to charge, collect and pay to the State the applicable sales tax on all taxable sales. Among other things, section 1132 of the Tax Law requires that every sales slip, invoice or receipt given to a customer separately state the amount of sales tax charged on that particular sale.

25. The Tax Law requires National and Ideal to report to the New York State Department of Taxation and Finance, on a monthly or quarterly basis, the amount of sales receipts for taxable sales and the amount of state and local sales tax due thereupon. Quarterly returns are due on March 20, June 20, September 20 and December 20 of each year. Monthly returns, if required, are due on the 20th of each month. Ideal and National are obligated by the Tax Law to pay the State the requisite sales taxes collected for the previous quarterly or monthly reporting period at the time they each file their respective quarterly (or monthly) returns.

26. As the sole owners of National, defendants Joseph and Vincent Anza direct and control National's activities in connection with National's state-mandated obligations of charging and collecting sales tax, making sales tax payments to the State and filing sales tax returns.

27. In violation of these laws, defendants Joseph and

Vincent Anza have, upon information and belief, schemed to run a "cash, no tax" business. When National's customers pay in cash, National's employees, as directed by defendants Joseph and Vincent Anza, do not charge or collect the required sales tax. In such instances, National provides to the customer a receipt on which only a single price is given and on which no sales tax is indicated. National's sales receipts do not represent that sales tax is included in the price.

28. Upon information and belief, National, at the direction of Joseph and Vincent Anza, does not report or pay to the State sales tax on those taxable sales for which National did not charge the tax to its customers.

29. Upon information and belief, defendants Joseph and Vincent Anza have furthered their unlawful "cash, no tax" scheme by filing or causing National's bookkeepers or accountants to file, by U.S. mail or electronically on a quarterly or monthly basis, for each reporting period starting in 1998 if not earlier, state sales tax returns on behalf of National that they know to be false. Upon information and belief, in each of these returns, defendants misrepresented the total amount of taxable sales and the amount of sales tax collected for the quarter (or month) for which each return accounts.

30. Upon information and belief, based on the fraudulent misrepresentations in National's sales tax returns, upon which the New York State Department of Taxation and Finance has relied and continues to rely, National has been able to avoid paying sales tax on a significant portion of its taxable sales. The false returns, and the State's reliance thereon, are essential for defendants to avoid paying required sales tax and to continue the scheme over an extended period of time. Defendants' "cash, no tax" racketeering scheme,

including their knowing filing of false returns, continues to the present day.

31. Upon information and belief, defendants' unlawful "cash, no tax" scheme involves the participation of various individuals who are as yet unknown to plaintiff and who act at the direction of Joseph and Vincent Anza to perpetrate and continue this scheme. Those individuals may include various National employees involved in sales, National's clerical or bookkeeping staff, and its accountants.

32. The purpose and direct effect of defendants' unlawful failure to collect tax on taxable sales, and their failure to pay such tax to the State by filing false sales tax returns, is to create an improper competitive advantage for National over Ideal. By failing to charge and collect sales tax and failing to remit sales tax to the State on taxable sales, which can only be accomplished on a continuing basis through false returns, National is able to reduce the total amount its cash customers pay by 8¼% without reducing its own profit margin.

33. Upon information and belief, Ideal's prices are the same or lower on average than National's. Where National does not charge sales tax on taxable sales, however, the overall cost to customers is typically lower than at Ideal for the same goods and services, because Ideal charges the sales tax.

34. But for defendants' scheme, National would not have a competitively significant price advantage over Ideal.

35. Defendants' scheme has had a significant deleterious effect on Ideal's business. For example, Ideal experienced a steep drop in taxable cash sales after National

opened its Bronx facility that was disproportionate to the effect that National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate.

36. Legitimate business competition cannot explain the dramatically disproportionate decline in Ideal's taxable cash sales in comparison with Ideal's other sales for which National cannot offer an unlawful savings under its "cash, no tax" scheme. This disparity can only be explained by National's unlawful price advantage gained from its unlawful "cash, no tax" scheme.

FIRST CAUSE OF ACTION
(Against Defendants Joseph Anza and Vincent Anza)
(Civil RICO, 18 U.S.C. §§ 1962(c) and 1964)

37. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. Defendants Joseph and Vincent Anza are "persons" under 18 U.S.C. § 1961.

39. National is an "enterprise" as defined in 18 U.S.C. § 1961.

40. National engages in interstate commerce. Upon information and belief, it purchases steel and other products from manufacturers outside of New York State and sells those products for use in the New York, New Jersey and Connecticut tri-state area.

41. Defendants Joseph and Vincent Anza own and are

associated with National.

42. Defendants Joseph and Vincent Anza, through their direction and control of National, have engaged in racketeering conduct.

43. The unlawful "cash, no tax" scheme run by defendants Joseph and Vincent Anza is a scheme to gain a competitive advantage over Ideal and increase National's market share at Ideal's expense by defrauding the New York State Department of Taxation and Finance of sales tax revenues due on taxable sales which National is obligated by law to collect and pay.

44. Upon information and belief, in furtherance of this scheme, National filed false state sales tax returns by mailing the returns with the United States Postal Service.

45. By filing, or directing National to file, by U.S. mail New York State sales tax returns that they knew to be fraudulent on a quarterly (or monthly) basis for each reporting period at least since 1998 if not before, defendants Joseph and Vincent Anza on each occasion violated the federal mail fraud statute (18 U.S.C. §§ 1341). Each violation constitutes a predicate act of racketeering under 18 U.S.C. § 1961(b).

46. To the extent that any of the false returns are filed with the State electronically, defendants have also violated 18 U.S.C. § 1343. Each violation of this statute is a predicate act of racketeering.

47. Defendants' filing of false sales tax returns on a quarterly or monthly basis constitutes a related and continuous pattern of racketeering activity under 18 U.S.C. § 1962. Each false sales tax return covers a distinct period for which

National failed to collect and remit to the state sales taxes owed from its taxable sales for that period, as required by law. Each false return constitutes a distinct fraud, yet reveals a single scheme which continues today.

48. The unlawful "cash, no tax" scheme of defendants Joseph and Vincent Anza directly injures Ideal because the unlawful tax saving is intended to and does attract customers to make purchases from National which would otherwise have been made from Ideal.

49. National can realize its unlawful tax saving only because the New York State Department of Taxation and Finance relies on National's false returns in accepting defendants' representations as to the amount of taxable sales and resulting sales tax owed. Upon information and belief, defendants' fraud, while perpetrated on the State, is directed at and directly injures Ideal because defendants' conduct is aimed at increasing National's market share and overall profits at the expense of its principal competitor, Ideal. Defendants pass on to National's customers the sales tax "savings" that National realizes as a result of its false returns, thereby increasing its sales and customer base through lower overall pricing without decreasing its profit margin. Thus, defendants profit from their scheme only by gaining business at Ideal's expense.

50. As a direct result of defendants' racketeering scheme and National's false state tax returns, Ideal has lost a substantial volume of its taxable cash business which has cost and continues to cost Ideal a substantial amount of profits and market share.

51. By reason of the foregoing, Ideal has been damaged in lost profits in an amount to be judicially

determined but believed to exceed $5,000,000. Pursuant to 18 U.S.C. § 1964(c), Ideal is entitled to recover treble damages in an amount to be judicially determined but believed to exceed $15,000,000.

SECOND CAUSE OF ACTION
(Against All Defendants)
(Civil RICO, 18 U.S.C. §§ 1962(a) and 1964)

52. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 51 of this Complaint as if fully set forth herein.

53. For purposes of 18 U.S.C. § 1962(a), National is also a "person" under 18 U.S.C. § 1961.

54. For many years, defendants Joseph and Vincent Anza and National have received income or proceeds derived from their unlawful "cash, no tax" racketeering scheme from sales at their Jamaica location.

55. Defendants Joseph and Vincent Anza and National invested racketeering income or proceeds derived from the conduct of their unlawful "cash, no tax" scheme at their Jamaica location to open National's Bronx location in or about the summer of 2000.

56. National's Bronx location is an enterprise under 18 U.S.C. § 1961 engaged in interstate commerce. Upon information and belief, National sells at its Bronx location steel and other products it purchased from manufacturers outside of New York State for use in jobs throughout the New York, New Jersey and Connecticut tri-state area.

57. Ideal has been and continues to be directly injured

by defendants' investment of racketeering proceeds or income in creating National's Bronx location and carrying on defendants' "cash, no tax" scheme at that location. As a result of defendants' investment of racketeering proceeds or income in the Bronx facility, Ideal has lost significant business and market share.

58. By reason of the foregoing, Ideal has been damaged in an amount to be judicially determined but believed to exceed $2,000,000. Pursuant to 18 U.S.C. § 1964(c), Ideal is entitled to recover treble damages in an amount to be judicially determined but believed to exceed $6,000,000.

THIRD CAUSE OF ACTION
(Against All Defendants)
(Breach of Contract)

59. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 58 of this Complaint as if fully set forth herein.

60. In 1994, National and other businesses owned and operated by Joseph and Vincent Anza filed a lawsuit against Ideal seeking damages for Ideal's alleged interference with National's customers and employees. *National Security Gates, Inc. et al. v. Vincent Brancato and Sons, Inc., et al.*, New York State Supreme Court, Queens County, Index No. 014536/94. The suit named Ideal as one of the defendants.

61. That lawsuit was discontinued pursuant to a "Stipulation of Settlement" dated January 14, 1997, entered into by National and Ideal among others, and signed by National and Ideal. Defendant Vincent Anza signed on National's behalf.

62. The Stipulation of Settlement is an enforceable contract governed by New York law.

63. Among other things, the Stipulation of Settlement provides that "both parties agree to stay away from and otherwise not interfere with each others [sic] business activities, other than through legitimate and proper competition" (emphasis added). That provision is material to the agreement.

64. Defendants' unlawful "cash, no tax" scheme, by definition, is neither legitimate nor proper competition.

65. Defendant's unlawful "cash, no tax" scheme interferes with Ideal's business because its direct purpose and effect is to gain market share for National at Ideal's expense through unlawfully reduced total pricing.

66. Defendants Joseph and Vincent Anza and National therefore have breached the Stipulation of Settlement by interfering with Ideal's business activities through illegitimate and improper means.

67. By reason of the foregoing, Ideal has been damaged in an amount to be judicially determined but believed to exceed $5,000,000.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request judgment be entered against defendants, jointly and severally, for the following:

a. Compensatory damages on the first cause of action under 18 U.S.C. § 1962(c) in an amount to be judicially

determined but believed to exceed $5,000,000, trebled pursuant to 18 U.S.C. § 1964(c) to an amount to be judicially determined but believed to exceed $15,000,000;

b. Compensatory damages on the second cause of action under 18 U.S.C. § 1962(a) in an amount to bo judicially determined but believed to exceed $2,000,000, trebled pursuant to 18 U.S.C. § 1964(c) to an amount to be judicially determined but believed to exceed $6,000,000;

c. Compensatory damages on the third cause of action for breach of contract in an amount to be judicially determined but believed to exceed $5,000,000;

d. The costs and disbursements of this action, including attorneys' fees pursuant to 18 U.S.C. § 1964(c); and

e. Such other relief as the court deems just and proper.

Dated: New York, New York
September 13, 2002

/s/ _____

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 4788 (RMB)

[Filed April 2, 2003]

IDEAL STEEL SUPPLY CORP., Plaintiff,	)
v.	)
JOSEPH ANZA, VINCENT ANZA and NATIONAL STEEL SUPPLY, INC., Defendants.	)

RICHARD M. BERMAN, U.S.D.J.

DECISION AND ORDER

I. Background

In this action, filed in June 2002, Ideal Steel Supply Corp. ("Plaintiff" or "Ideal") alleges that National Steel Supply, Inc. ("National") and its owners, Joseph and Vincent Anza (collectively, "Defendants"), engaged in a "racketeering" scheme in violation of 18 U.S.C. §§ 1962(a) and (c)("RICO"). Ideal's amended complaint also includes a state law breach of contract claim. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) and 9(b).

The Court treats the following allegations in the amended complaint ("AC") as true for the purposes of this motion. *See Piccone v. Bd. of Directors of Doctors Hosp.*, 97 Civ. 8182, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *1 (S.D.N.Y. Aug. 28, 2000).

Ideal and National distribute and sell steel mill products and related hardware, supplies, and services, including steel bars and sheets, in a "lumber yard" setting to ornamental ironworkers, small steel fabricators, and do-it-yourself homeowners. (ACPP2, 16.) Ideal and National each have two store locations, one in the Bronx and one in Jamaica, Queens. (ACPP3, 19-20.) Each one of Ideal's stores is located within a few minutes of each of National's stores. (ACPP19-20.)

National is Ideal's principal competitor in New York City for the products it sells. (ACP15.) No other business in the Bronx or Queens sells "the same or a similar comprehensive array of products and services or competes for the same customers." (ACPP3, 16, 19-20.) "As Ideal and National sell at nearby locations similar product lines of generic commodities, they compete principally on the basis of price." (ACPP3, 21.) Demand in the market does not fluctuate based on price, but on the robustness of the construction industry. (ACP22.) Accordingly, Ideal and National can not increase demand by reducing prices or aggressively marketing their products. (ACP22.) Increases in sales at one of the competitor's stores -- if not caused by overall market demand -- generally occurs with concomitant decreases in the other's sales. (ACP22.)

The products Ideal and National sell are taxable at 8.25% unless they fall within one of the New York State sales tax

exemptions.[1] (ACPP18, 23.) New York State tax law requires businesses to pay the taxes collected and to submit an account of taxable sales in monthly or quarterly returns. (ACP25.) It is alleged that National does not charge cash-paying customers sales tax (on taxable sales) in violation of New York State sales tax laws. (ACPP4, 27.) Defendants do not report or pay to the New York State Department of Taxation and Finance any sales tax on the sales for which Defendants illegally ignore sales tax. (ACPP4, 28.) Since 1998 and continuing to today, National has filed (either by U.S. mail or electronically) fraudulent sales tax returns with the New York State Department of Taxation and Finance. (ACPP5, 29, 44, 47.)The returns misrepresent the amount of taxable sales at National and the amount of sales tax National collects each reporting period. (ACP29.)

Defendants' "cash, no tax" scheme directly injures Ideal because Ideal cannot charge its customers 8.25% more than National and still compete on price, the principal factor in choosing between Ideal and National. (ACPP6, 48.) "National offers customers a substantial savings over Ideal because National does not charge, collect or pay the required sales tax of 8 1/4% on non-exempt cash sales, thereby reducing the total price paid by customers making cash purchases at National, without reducing National's profit margin." (ACPP6, 32, 49.) As a result of Defendants' "cash, no tax" scheme, Ideal has experienced a decrease in taxable cash sales. (ACPP6, 36, 50.) For example, "Ideal experienced a steep drop in taxable cash sales after National opened its Bronx facility that was disproportionate to the effect that

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[1] The combined New York State and City sales tax equals 8.25%. See N.Y. Tax Law §§ 1105, 1107, 1109 (McKinney Supp. 2003).

National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate." (ACP35.) The effect of Defendants' "cash, no tax" scheme "is to create an improper competitive advantage for National over Ideal." (ACPP32, 49.)

"By filing, or directing National to file, by U.S. mail New York State sales tax returns that they knew to be fraudulent on a quarterly (or monthly) basis for each reporting period at least since 1998 if not before, defendants Joseph and Vincent Anza on each occasion violated the federal mail fraud statute (18 U.S.C. § 1341). Each violation constitutes a predicate act of racketeering under 18 U.S.C. § 1961(1)(B). To the extent that any of the false returns are filed with the State electronically, defendants also violated 18 U.S.C. § 1343. Each violation of this statute is a predicate act of racketeering."[2] (ACPP45-46; *see* ACP5.) Ideal claims that this "cash, no tax" scheme constitutes a pattern of RICO racketeering, punishable under 18 U.S.C. § 1962(c), (ACPP7, 45-51); that Defendants (re)invest the money from the alleged RICO scheme in National's Bronx location, punishable under 18 U.S.C. § 1962(a), (ACPP55-58); and that the scheme breaches a settlement agreement the parties executed in a 1997 litigation, wherein National and Ideal agreed, among other things, not to interfere with each others' "business activities other than through legitimate and proper

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[2] *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985)("Mail fraud qualifies as a racketeering activity under the statute, 18 U.S.C. § 1961(1), and mailing fraudulent state sales tax returns qualifies as mail fraud."); *see also Porcelli v. United States*, 964 F.2d 1306, 1307 (2d Cir. 1992).

competition."[3] (ACPP8, 60-67.) **For the reasons set forth below, the Court grants Defendants' motion to dismiss.**

II. Standard of Review

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see McLaughlin v. Anderson*, 962 F.2d 187, 190 (2d Cir. 1992). In resolving a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001); *McLaughlin*, 962 F.2d at 190. In other words, the burden on the movant is very substantial, as the issue before the Court in a Rule 12(b)(6) motion "is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995)(quoting *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1976) (*per curiam*)). While "the well-pleaded material allegations of the complaint are taken as admitted...

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[3] "In 1994, National and other businesses owned and operated by Joseph and Vincent Anza filed a lawsuit against Ideal seeking damages for Ideal's alleged interference with National's customers and employees. *National Security Gates, Inc., et al. v. Vincent Brancato and Sons, Inc., et al.*, New York State Supreme Court, Queens County, Index No. 014536/94." (ACP60.) "That lawsuit was discontinued pursuant to a 'Stipulation of Settlement' dated January 14, 1997." (ACP61.)

conclusions of law or unwarranted deductions of fact are not admitted." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)(internal quotation omitted). Where, as here, a complaint alleges (mail and/or wire) fraud, the pleading requirements of Fed. R. Civ. P. 9(b) apply. *Id.*; *McLaughlin*, 962 F.2d at 191.

"Civil RICO is an unusually potent weapon--the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO claim ... has almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996)(citations omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997).

III. Analysis

Along with the amended complaint, the Court has reviewed the Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated October 11, 2002 ("Defs. Br."); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated November 8, 2002 ("Pl. Br."); and the Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated November 19, 2002.[4]

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[4] Oral argument is not needed. *See* Letter from Counsel for Defendant, dated Nov. 19, 2002 ("Both sides have agreed that the parties are content to leave the question of oral argument to the Court.")

The Defendants argue, in support of their motion, that (1) Plaintiff lacks standing to bring a RICO claim because Plaintiff does not allege "proximate cause," Def. Br. at 6 ("National's alleged avoidance of New York State sales tax could only directly affect New York State tax collections, not Ideal's business."); (2) Plaintiff has failed to plead the allegations of mail and wire fraud with particularity as required under Fed. R. Civ. P. 9(b); and (3) the Court must dismiss Plaintiff's supplemental state law claims if the Court dismisses the RICO claims.

Plaintiff responds that proximate cause exists under applicable case law. Plaintiff also argues that the amended complaint, fairly read, alleges fraud with sufficient particularity, and, where it lacks particularity, "the relevant facts are peculiarly within the [Defendants'] knowledge." Pl. Br. at 21-22. Plaintiff concedes that if the Court dismisses the RICO claims "the basis for supplemental jurisdiction is attenuated," but adds that a dismissal of the state-law claims would not be on the merits. Pl. Br. at 25 n.12.

"RICO grants standing to pursue a civil damages remedy to 'any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].' 18 U.S.C. § 1964(c). In order to bring suit under § 1964(c), a plaintiff must plead (1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation." *Commercial Cleaning*, 271 F.3d at 380 (alteration in original). Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,'

meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. Painewebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 97 CIV. 9380, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), *aff'd* 00-7356, 242 F.3d 366, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995); *Macomber v. Travelers Prop. Cas. Corp.*, 3:98-CV-01060, 1999 U.S. Dist. LEXIS 2707, 1999 WL 118005, at *2 (D. Conn. Jan. 28, 1999). *See generally* Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: Civil & Criminal Law & Strategy, § 1.07[6], at 1-128 (2002)("The Second Circuit ... requires that in the context of predicate acts grounded in fraud the plaintiff must prove both transaction causation and loss causation.").

Ideal has not plead transaction causation. Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged -- indeed, can not allege -- that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail. *See Odyssey*, 85 F. Supp. 2d at 302 (holding that "to show transaction causation, ... plaintiff must show that it relied on defendant's omission."); *Mezzonen*, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5-*6; *Moore*, 189 F.3d at 169-71.[5]

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[5] *See also Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 (holding that plaintiff "failed to plead sufficient

Plaintiff's reliance on *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001)("*Commercial Cleaning*") to establish causation is not compelling. In *Commercial Cleaning*, reliance was not an issue -- the plaintiff based its RICO complaint upon a violation of the Immigration and Nationality Act, 8 U.S.C. § 1324(a). *Commercial Cleaning*, 271 F.3d at 378, 380 (alleging that defendant "engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of Section 274 of the Immigration and Nationality Act"). Ideal, on the other hand, bases its RICO claim on mail and wire fraud -- and that is a critical difference. *See Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 ("If one alleges predicate acts of mail fraud, as [plaintiff] does, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the

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facts demonstrating either that he relied on defendants' fraudulent misrepresentations or that such reliance caused him injury"); *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 925 F. Supp. 162, 164 (S.D.N.Y. 1996)(denying motion to reconsider holding that "in alleging mail or wire fraud as predicate acts in a civil RICO complaint, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the reliance was the cause of the injury"); *Miller v. Helmsley*, 745 F. Supp. 932, 940 n.5 (S.D.N.Y. 1990)(siding, in dicta, with cases holding that plaintiff must allege it relied on fraud); *accord Corcoran v. American Plain Corp.*, 886 F.2d 16, 19-20 (2d Cir. 1989); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988). Other courts appear to have held that third-party reliance is sufficient. *See, e.g., Sterling Interiors Group v. Haworth, Inc.*, 94 Civ. 9216, 1996 U.S. Dist. LEXIS 13908, 1996 WL 537482, at *3 (S.D.N.Y. Sept. 23, 1996); *Trautz v. Weisman*, 819 F. Supp. 282, 286 (S.D.N.Y. 1993); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969, 973 (S.D.N.Y. 1989); *see also Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990).

reliance was the cause of the injury.").

"We must be content with making our best efforts to make recovery commensurate with the statutory wrong and to set out 'our more or less inadequately expressed ideas of what justice demands' in each case." *Sperber v. Boesky*, 849 F.2d 60, 66 (2d Cir. 1988)(quoting W. Page Keeton, et al., Prosser & Keeton on the Law of Torts 264 (5th ed. 1984)). The Court holds that Plaintiff can not, as a matter of law, allege that it relied on Defendants' alleged misrepresentations to the New York State Department of Taxation and Finance. *See, e.g., Odyssey*, 85 F. Supp. 2d at 302; *see also Moore*, 189 F.3d at 169-70. Consequently, Plaintiff can not satisfy the pleading requirements for its RICO claims. *See Sperber*, 849 F.2d at 60 (dismissing complaint alleging violations of 1962(a) through (d) for failure to plead causation adequately); *Miller*, 745 F. Supp. at 935-40 (same).[6]

Because the Court dismisses Plaintiff's federal (RICO) claims, the Court also dismisses the state law breach of contract claim (without prejudice). *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 130 (2d Cir. 2003)("In most circumstances, a district court should decline supplemental jurisdiction if all federal claims have been dismissed at the pleading stage."); *Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *7 (dismissing state law claims without prejudice to refiling in state court);

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[6] Because the Court dismisses Plaintiff's RICO claims on causation grounds, the Court need not address Defendants' alternative argument that the pleading fails to comply with the particularity requirements of Fed. R. Civ. P. 9(b). *See Barr Labs., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 116 n.6 (E.D.N.Y. 1993); *Miller*, 745 F. Supp. at 934.

see Pl. Br. at 25 n.12.

IV. Conclusion and Order

For the reasons stated, the Court grants Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court respectfully requests that the Clerk close this case.

Dated: April 1, 2003

/s/
RICHARD M. BERMAN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7381

[Filed July 2, 2004]

IDEAL STEEL SUPPLY CORP.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
JOSEPH ANZA, VINCENT ANZA,	)
and NATIONAL STEEL SUPPLY, INC.,	)
Defendants-Appellees.	)
	)

Appeal from a judgment of the
United States District Court
for the Southern District of New York
Richard M. Berman, Judge

Before: WALKER, Chief Judge, and KEARSE and CABRANES, Circuit Judges.

OPINION

KEARSE, Circuit Judge:

Plaintiff Ideal Steel Supply Corp. ("Ideal") appeals from a judgment of the United States District Court for the Southern District of New York, Richard M. Berman, Judge, dismissing its amended complaint, brought principally under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000) ("RICO"), alleging that Ideal's

business had been injured by reason of the practice of defendants National Steel Supply, Inc. ("National"), et al., of failing to charge certain customers sales taxes as required by New York State ("State") law and thereafter sending the State Department of Taxation and Finance ("State Tax Department") fraudulent sales tax reports by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. Ideal also asserted a state-law claim for breach of contract. The district court dismissed the RICO claims pursuant to Fed. R. Civ. P. 12(b)(6), ruling that the complaint did not state a claim under 18 U.S.C. § 1964(c) because it failed to allege the necessary causation, in that it did not, and could not, assert that the alleged misrepresentations had been relied on by Ideal. The court declined to exercise supplemental jurisdiction over the contract claim and dismissed that claim without prejudice. On appeal, Ideal contends that it adequately pleaded that its lost sales were proximately caused by National's pattern of offering customers lower bottom-line cost by means of the unlawful omission of state sales tax and concealing those omissions by means of mail and wire fraud. For the reasons that follow, we agree.

I. BACKGROUND

We summarize below the allegations of the amended complaint ("complaint"), the truth of which is assumed as is required on review of a Rule 12(b)(6) dismissal. We take those allegations, and the reasonable inferences that can be drawn from them, in the light most favorable to Ideal.

A. The Competitors

Ideal is in the business of purchasing steel mill products from manufacturers outside of New York State and selling those products and related hardware and services to

professional ironworkers, small steel fabricators, and do-it-yourself homeowners, for use in the New York, New Jersey, and Connecticut area. It has retail stores in Queens and the Bronx.

National, which is owned by defendants Joseph and Vincent Anza (collectively "the Anzas"), sells substantially the same products as Ideal to essentially the same customer base. National has retail outlets in Queens and the Bronx, located a few minutes' drive from Ideal's stores.

Ideal and National are the only substantial competitors in the Bronx or Queens for sales of the steel products they carry. No businesses in those areas other than Ideal and National carry "the same or a similar comprehensive array of products and services or compete for the same customers." (Complaint ¶ 3.) Given the similarity of their product lines (which comprise "generic commodities," *id.*) and the proximity of their retail outlets to each other in each Borough, Ideal and National compete against one another "primarily on the basis of price" (Complaint ¶ 21); "differences in prices charged by Ideal and National affect customers' decisions to purchase from one or the other" (Complaint ¶ 22). Price fluctuation, however, does not affect overall demand for the products offered by Ideal and National; rather, overall demand is determined by "economic activity in the real estate and construction businesses" and other considerations beyond the control of National or Ideal. (*Id.*)

B. The Allegedly Fraudulent Scheme

Under State law, Ideal and National are required to charge, collect, and remit to the State a combined state and local sales tax of 8B percent on any sale for which the customer does not qualify for an exemption. (*See* Complaint

¶¶ 23-25.) All sales are presumed by law to be taxable unless, within 90 days of purchase, the purchaser presents to the seller a valid resale or exemption certificate. (Complaint ¶ 23.)

Both Ideal and National conduct much of their business on a cash-and-carry basis. According to the complaint, Ideal complies with the state-law requirements that it charge and pay sales taxes, but National does not. The complaint alleged that, at the direction of the Anzas, National does not charge cash-paying non-exempt customers any sales tax; this allows those customers to save 8B percent on their purchases, thereby incurring a substantially lower bottom-line cost than they would incur by purchasing the same items from Ideal.

In order to maintain its profit margin while drawing customers away from Ideal with these unlawful "cash, no tax" sales, National, having refused to charge and collect the sales tax, simply does not pay the tax due on those sales. To conceal the amounts due, National has, since at least 1998, submitted fraudulent sales tax reports to the State Tax Department, failing to report those sales and misrepresenting its total taxable sales. (Complaint ¶¶ 29-30.) National has filed the fraudulent reports, which are essential to the success of this scheme, by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343.

Ideal commenced the present action in 2002, alleging that National's "cash, no tax" sales, along with the necessary fraudulent reporting, were intended to and did injure Ideal's business. The complaint alleged that National's repeated fraudulent mailings and/or wire transmissions--on which the State Tax Department relied and continues to rely, enabling National to avoid paying sales tax on a significant portion of its taxable sales--constituted a pattern of racketeering activity

that "continues to the present day." (Complaint ¶ 30.) Ideal alleged that its own list prices were, on average, no higher than those of National, and that but for defendants' "cash, no tax" scheme, National would have had no competitively significant price advantage over Ideal. The complaint alleged that as a result of the Anzas' operation of National through the above pattern of racketeering activity, in violation of RICO § 1962(c), Ideal had suffered "lost profits in an amount . . . believed to exceed $ 5,000,000." (Complaint ¶ 51.)

In addition, the complaint alleged that the Anzas and National had violated RICO § 1962(a) by using profits gained from the "cash, no tax" scheme at National's Queens facility to open its outlet in the Bronx. (*See* Complaint ¶ 55.) That investment of racketeering income, along with defendants' implementation of the "'cash, no tax' scheme at that location" as well caused Ideal's Bronx outlet to "los[e] significant business and market share" (Complaint ¶ 57) resulting in damages in excess of $2,000,000 (*see* Complaint ¶ 58).

The complaint also alleged that defendants' "cash, no tax" scheme violated the terms of an agreement that had settled an earlier lawsuit between the parties. (Complaint ¶ 66.) The complaint requested treble damages on each RICO claim and single damages on the contract claim.

C. The Decision of the District Court

Defendants moved to dismiss the complaint pursuant to, inter alia, Fed. R. Civ. P. 12(b)(6), arguing that Ideal lacked standing to bring its RICO claims because it had not adequately alleged that its injuries were proximately caused by defendants' alleged violations of § 1962. In a Decision and Order reported at 254 F. Supp. 2d 464 (2003), the district court granted the motion, stating in part as follows:

> Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,' meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 1999 U.S. Dist. LEXIS 17625, 97 CIV. 9380, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), aff'd 2 Fed.Appx. 109, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995)
>
> . . . .

254 F. Supp. 2d at 467-68 (emphasis in original). The court ruled that Ideal had failed to plead transaction causation:

> Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged--indeed can not allege--that Plaintiff relied on the sales tax returns Defendants mailed or

> wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail.

Id. at 468.

The court stated that although some RICO claims, such as those asserted in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), are based on predicate acts that do not involve reliance, a RICO plaintiff must be able to show reliance--its own reliance--when the alleged racketeering activity on which its RICO claim is based is mail fraud or wire fraud. *See id.* at 468-69.

Having concluded that Ideal's RICO claims must be dismissed pursuant to Rule 12(b)(6), the court declined to exercise supplemental jurisdiction over Ideal's contract claim, and it dismissed that claim without prejudice. Judgment was entered accordingly, and this appeal followed.

II. DISCUSSION

On appeal, Ideal contends that, despite the fact that it did not itself rely on National's mail and wire frauds, it has standing to assert its civil RICO claims because it alleged facts sufficient to show that injury to its business was proximately caused by National's pattern of racketeering activity and investment of racketeering income. Because the complaint alleges that Ideal was a competitor of National and was an entity directly targeted for injury by National's racketeering activity, we agree.

A. Mail and Wire Fraud Racketeering Activity

RICO authorizes a private right of action for treble damages by a "person injured in his business or property by

reason of a violation of section 1962 of [Title 18]." 18 U.S.C. § 1964(c). Section 1962 provides, in pertinent part, that

> it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce,

18 U.S.C. § 1962(a), and that

> it shall be unlawful for any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity,

id. § 1962(c).

RICO defines racketeering activity to include mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1). The mail and wire fraud statutes prohibit the use of those means of communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. The mailing of false state sales tax returns may constitute mail fraud in violation of § 1341. *See, e.g., United States v. Porcelli*, 865 F.2d 1352, 1360-61 (2d Cir.), *cert. denied*, 493 U.S. 810, 110 S. Ct. 53, 107 L. Ed. 2d 22 (1989); *see also United States v. Slevin*, 106 F.3d 1086,

1088 (2d Cir. 1996) ("Because the[mail and wire fraud] statutes use the same relevant language, they are analyzed in the same way.").

Generally, two or more related acts of racketeering activity may be considered a "pattern" of racketeering activity. *See* 18 U.S.C. § 1961(5); *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir.) (*en banc*), *cert. denied*, 491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 700 (1989).

B. Civil RICO Claims and Proximate Causation

The requirement in § 1964(c) that a civil RICO plaintiff show that it was injured in its business or property "by reason of" the defendant's RICO violation means that the plaintiff must plead and prove that the violation not only was the logical, or "but for," cause of the injury but also was its legally cognizable, or proximate, cause. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir.), *cert. denied*, 124 S. Ct. 532, 157 L. Ed. 2d 424 (2003); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 380 (2d Cir. 2001) ("*Commercial Cleaning*"); *In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 399 (2d Cir. 1994) ("*American Express*").

> "Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom may have been injured by his conduct, but only those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was

> 'reasonably foreseeable or anticipated as a natural consequence.'"

Lerner v. Fleet Bank, N.A., 318 F.3d at 123 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990)), *cert. denied*, 513 U.S. 1079, 115 S. Ct. 728, 130 L. Ed. 2d 632 (1995)).

> The requirement that a defendant's actions be the proximate cause of a plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. *See Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988). In marking that boundary, the Supreme Court has emphasized that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient."

Commercial Cleaning, 271 F.3d at 380 (quoting *Holmes*, 503 U.S. at 268 (other internal quotation marks omitted)).

1. Operating an Enterprise in Violation of § 1962(c)

Applying these principles to claims that the affairs of a RICO enterprise have been conducted in violation of subsection (c) of § 1962, we have upheld dismissals of a variety of civil RICO complaints where the alleged injury was too remote from the alleged racketeering activity. For example, in *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988),

the plaintiffs sought damages from a defendant convicted of insider trading in certain stocks, alleging that the plaintiffs lost money investing in other companies in which the defendant was a also shareholder. Plaintiffs' theory was that the defendant's reputation as a successful investor--gained as a result of his pattern of insider trading--had artificially inflated the prices of the stocks purchased by the plaintiffs. The complaint alleged that the plaintiffs suffered investment losses as the prices of those shares fell following the defendant's conviction for insider trading. *See id.* at 62. We affirmed the Rule 12(b)(6) dismissal because the alleged injuries were too remote from the defendant's unlawful activity.

In *Hecht v. Commerce Clearing House, Inc.*, the plaintiff brought a civil RICO action against his former employer and co-workers, alleging that they had implemented a scheme to defraud customers in violation of the mail fraud and wire fraud statutes. The plaintiff alleged that he had been injured by the fraudulent scheme both because clients whom he had serviced had discovered the frauds and ceased to do business with his employer, thereby costing him commissions he would have otherwise earned, and because he had been fired for refusing to participate in the frauds. *See* 897 F.2d at 22-24. We upheld the district court's dismissal of the plaintiff's claims, explaining that the plaintiff was "'neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s],'" and that the plaintiff's injuries, as a result, were not "reasonably foreseeable . . . natural consequence[s] of the RICO violations" for purposes of § 1964(c). *Id.* at 24 (quoting *Sperber v. Boesky*, 849 F.2d at 65).

In *Lerner v. Fleet Bank, N.A.*, the plaintiffs, who had invested with an attorney who absconded with their money,

brought civil RICO claims against the banks in which their funds had been deposited. The plaintiffs claimed that the banks had engaged in racketeering activity, to wit, mail and wire fraud, by sending back to various payees bounced checks that the banks stamped "refer to maker," rather than "insufficient funds"; telling some payees that their checks had been dishonored because of a computer error or because the check had been written on the wrong account, rather than because the attorney had insufficient funds; and sending statements to the attorney that did not mention the dishonored checks. *See* 318 F.3d at 119. The plaintiffs alleged that the banks also failed to report the attorney's overdrafts and other defaults to state disciplinary authorities, which would have caused the attorney to be disbarred and thereby led the plaintiffs to discontinue their investments with him. We held that the connection between the plaintiffs' injuries and the banks' mailings, which obscured the attorney's criminal behavior, was far too attenuated to meet the requirement of proximate cause and that the complaint thus failed to state a civil RICO claim. *See id.* at 122-24.

In *American Express*, we upheld the Rule 12(b)(6) dismissal of a derivative action complaint by shareholders of American Express alleging that company officials had committed mail and wire frauds and repeated acts of bribery in an effort to defame one Edmond J. Safra, an American Express competitor. *See* 39 F.3d at 396-98. When the fraudulent acts were discovered, American Express was injured by, *inter alia*, losing business and goodwill and having to pay millions of dollars in legal fees and settlements. We upheld the dismissal of the complaint because the alleged injuries to the company were not proximately caused by the racketeering activities of fraud and bribery but rather were caused by the fact that those activities did not have their intended effect and were discovered by their intended target.

The target of the unlawful acts was Safra, not American Express; the "RICO defendants' scheme was 'an illicit scheme to injure a potential major competitor of [American Express].'" *Id.* at 400 (quoting the plaintiffs' brief on appeal).

> The injuries alleged thus were neither the "preconceived purpose" nor the "specifically-intended consequence" of the RICO defendants' acts. Moreover, any losses to American Express were caused only because the scheme itself was exposed and thus failed. Therefore, the harm to American Express was neither the "necessary result" of the scheme nor . . . "foreseeable" . . . .

Id.

We reached a similar result in *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816, 117 S. Ct. 66, 136 L. Ed. 2d 27 (1996), in which the defendant advertising agency had paid nearly $1 million to two individual defendants who informed it, falsely, that Abrahams, then a Jamaican tourism official, could be bribed to grant the agency the Jamaican Tourism Board ("JTB") advertising business. Although none of the bribery money was ever given to Abrahams, he was indicted along with the scheme's participants. After the charges against him were dropped, Abrahams brought a civil RICO action alleging "injuries to his reputation and to his emotional, financial, political, and social status resulting from widespread public dissemination of false information about his role in the bribery scheme." *Id* at 236. We noted, however, that "Abrahams was neither an intended target of the scheme nor an intended beneficiary of the laws prohibiting it." *Id.* at 238. Nor was he injured by the scheme itself; rather, "Abrahams was injured . . . by the fallout from the scheme's exposure." *Id.* at 239.

We thus upheld the dismissal of Abrahams's complaint for failure to state a civil RICO claim on the ground that his injuries were not sustained "by reason of" the agency's racketeering activity within the meaning of § 1964(c).

In *Baisch v. Gallina*, in contrast, we reversed the grant of summary judgment dismissing the civil RICO claims asserted by a plaintiff lender against insurance brokers and an operator of Raycon Construction Co. ("Raycon"), a company that, in order to do business with Nassau County, was required "to provide the County with estimates of the number and type of workers needed for each project, along with the number of hours to be worked and the hourly rate per worker." 346 F.3d at 369. The complaint alleged that "the defendants engaged in a pattern of racketeering activity by causing Raycon to submit to Nassau County fraudulent documents, including inflated estimates and falsified claim vouchers." *Id.* Baisch entered into a factoring agreement with Raycon and lost money when Raycon submitted the fraudulent vouchers--and other vouchers not even submitted to the County--to him, and he advanced funds based on those fraudulent vouchers. The district court ruled that Baisch lacked standing to bring a civil RICO claim because the party directly injured by the alleged racketeering activity would have been the County. We disagreed with the premise that only one category of victim has standing to bring a civil RICO claim. We noted that the foreseeability component of proximate cause is established where the plaintiff was a "target[]" and "intended victim[] of the racketeering enterprise," *id.* at 374 (internal quotation marks omitted), even if he was not the primary target or victim, and that "no precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing," *id.* at 375. We noted that the frauds on Baisch and the County were intertwined, and we held that Baisch had standing to pursue a RICO claim based in part on the false

vouchers submitted to the County because "the defendants specifically targeted [him] as their victim allegedly by taking his loans under false pretenses and consciously creating a high risk of defaulting on those loans." *Id.*

In each of the above cases in which we approved the summary dismissal of the complaint, we noted that the plaintiffs were not competitors of the racketeering enterprise or targets of alleged racketeering activity. *See, e.g., Lerner v. Fleet Bank, N.A.*, 318 F.3d at 124 ("We have repeatedly emphasized that the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise."); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d at 24 (plaintiff was "neither the target of the racketeering enterprise nor the competitor[] . . . of the racketeer[s]" (internal quotation marks omitted)); *Sperber v. Boesky*, 849 F.2d at 65 (plaintiffs were "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer"). The view that a competitor alleging injury to its business resulting from racketeering activity of a defendant competitor adequately pleads proximate cause within the meaning of § 1964(c) is consistent with the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). In *Sedima*, a divided Court ruled that a civil RICO plaintiff, who had alleged predicate acts of mail and wire fraud, could recover damages not only for "racketeering injury," but also for injury caused directly by RICO predicate acts. *See id.* at 495-96. Although the Court was divided on that issue, all members were in agreement that the principal persons for whose benefit the RICO private right of action was created included a defendant's "competitors . . . whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration in the relevant market," or who could "plead and prove that they suffered . . . injury to their

competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity," 473 U.S. at 519-20 (Marshall, J., dissenting); *see* 473 U.S. at 497 n.15 (majority opinion, stating that damages recoverable under RICO "include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery").

In *Commercial Cleaning*, we reversed the Rule 12(b)(6) dismissal of a civil RICO complaint alleging that the plaintiff's competitor had engaged in a pattern of racketeering activity, to wit, knowingly hiring undocumented aliens in violation of 8 U.S.C. § 1324(a), which "enabled [the defendant] to lower its variable costs and thereby underbid competing firms, which consequently lost contracts and customers to [the defendant]." 271 F.3d at 378. We noted that the plaintiff was

> not alleging an injury that was derivative of injury to others. Commercial does not seek to recover based on the misfortunes visited upon a third person by the defendant's acts. . . . It claims to have lost profits directly as the result of [the defendant's] underbidding, which it achieved through its violation of § 1324(a). *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994) (holding that the value of business opportunities lost due to defendant's RICO violations is compensable); *Mid Atlantic Telecom Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (noting that plaintiff was not seeking to vindicate claims of customers who accepted defendant's fraudulent, ostensibly lower rates, but rather alleged "distinct and independent injuries: lost customers and lost revenues") . . . . We have stated a plaintiff has standing where the plaintiff

> is the direct target of the RICO violation. *See Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 238 (2d Cir. 1996); *American Express*, 39 F.3d at 400 (targets of RICO violations were competitive rivals not shareholders harmed by decrease in stock value upon exposure of scheme); *see also Mid Atlantic Telecom*, 18 F.3d at 263 (plaintiff has standing if it can show that it was a "direct target" of defendant's RICO violations). As discussed above, the theory of Commercial's claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals, thus qualifying them as direct targets of the RICO violation.

Commercial Cleaning, 271 F.3d at 384 (internal quotation marks omitted).

In the present case, the district court viewed our holding in *Commercial Cleaning* as inapposite here because the predicate acts alleged in that case were not frauds. We disagree with the court's conclusion. As revealed in the above quotation, *Commercial Cleaning* itself relied in part on the reasoning of cases such as *Abrahams v. Young & Rubicam Inc.* and *American Express*, in which the alleged predicate racketeering activities included acts of fraud. In particular, we cited with approval *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.) ("*Mid Atlantic*"), *cert. denied*, 513 U.S. 931, 115 S. Ct. 323, 130 L. Ed. 2d 283 (1994), in which the Fourth Circuit held that a competitor had standing to bring a civil RICO claim where the only racketeering activities alleged were mail frauds in communications from the defendants to the plaintiff's customers. In that case, Mid Atlantic Telecom, Inc. ("Mid Atlantic"), and defendant Long Distance Services, Inc. ("LDS"), were resellers of long-distance telecommunications

services competing for the same customers. The complaint alleged that the defendants had engaged in a pattern of fraudulent mailings, soliciting customers by offering them artificially low rates, lower than Mid Atlantic's basic rates, forcing Mid Atlantic to meet the apparently lower LDS rates. However, "in practical effect, . . . the quoted [LDS] rates were not [as] low[as had been represented], since additional minutes were randomly and artificially added [by the defendants] to the lengths of telephone calls" made by LDS customers. *Mid Atlantic*, 18 F.3d at 261. The defendants contended that "Mid Atlantic d[id] not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did"; that, therefore, defendants' "customers were the only victims of the alleged fraud"; and hence "the [defendants'] solicitations could not have been the proximate cause of Mid Atlantic's injuries." *Id.* at 263. The Fourth Circuit rejected these contentions and vacated the summary dismissal of the complaint, noting that Mid Atlantic was "not seeking [either] to vindicate the rights of its former customers who may have been offered fraudulently low rates" or to recover for injuries "derivative of any losses suffered by its former customers." *Id.* at 264. Rather, "Mid Atlantic alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor." *Id.* at 263. The court recognized that there may be more than one category of victims to whom a defendants' conduct can proximately cause injury, and that although the customers may have been the most direct victims of the defendants' alleged frauds, Mid Atlantic "claim[ed] distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match [the defendants'] fraudulent ones." *Id.* at 264.

> . . . Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, [the individual defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers).

Id. at 263.

The *Mid Atlantic* holding that a civil RICO plaintiff might prevail by establishing that his injury was proximately caused by a defendant's mail frauds that were relied on by a third person is consistent with the view that this Court had adopted in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"). In *LILCO*, the County of Suffolk had asserted a civil RICO claim alleging that defendants Long Island Lighting Company ("LILCO") and its officers committed mail fraud in the course of State Public Service Commission ("PSC") proceedings, inducing the PSC to grant LILCO unwarranted and excessive rate increases. Although we upheld the posttrial dismissal of that claim for lack of proof that the rate increases were in fact caused by the alleged frauds, we plainly accepted the principle that a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff. Noting that the "by reason of" phrase in § 1964(c) "requires that there be a causal connection between the prohibited conduct and plaintiff's injury," 907 F.2d at 1311, and citing, *inter alia*, *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969 (S.D.N.Y. 1989) ("*Shaw*"), we stated that

> in the context of this case, which involves RICO mail fraud claims, this means that it was necessary for Suffolk to demonstrate at trial that LILCO's

> misrepresentations to the PSC were relied upon by the PSC, . . . and that such misrepresentations caused LILCO's rate increases to be granted.

LILCO, 907 F.2d at 1311 (emphases added). Although we ultimately found the trial evidence insufficient, we plainly adopted the principle stated in *Shaw* that "[a] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived," 726 F. Supp. at 973.

Although cases such as *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) ("*Evans*"), *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) ("*Corcoran*"), and *Metromedia Co. v. Fugazy*, 983 F.2d 350 (2d Cir. 1992) ("*Metromedia*"), *cert. denied*, 508 U.S. 952, 113 S. Ct. 2445, 124 L. Ed. 2d 662 (1993), have sometimes been cited for the proposition that a civil RICO claim based on mail or wire fraud cannot be established absent proof that the plaintiff itself relied on the misrepresentation, *see, e.g., Corcoran*, 886 F.2d at 21 (discussing a possible need for "convergence of the deceived and the injured"), none of those cases held that the plaintiff's own reliance was required. The *Evans* and *Corcoran* cases, which were decided under the then-prevailing *McNally* principle that fraudulent mailings did not violate § 1341 unless the scheme was designed to deprive the victim of money or property, *see McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), superseded by statute, 18 U.S.C. § 1346, discussed the convergence theory but did not turn on reliance at all. They held that the government in *Evans* and the plaintiff New York State Superintendent of Insurance in *Corcoran* could not show that they had been deprived of money or property and hence had not even alleged RICO predicate acts. And in *Metromedia*, we stated that "the plaintiff was required to demonstrate that the

defendant's misrepresentations were relied on," 983 F.2d at 368 (emphasis added), without suggesting a limitation as to what entity's reliance would suffice, and we cited *LILCO*, 907 F.2d at 1311, which, as discussed above, plainly indicated that a plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether it was the plaintiff or a third party that was deceived. This Court has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the fraud.

The principle that a plaintiff who is injured as a proximate result of RICO predicate acts of fraud need not prove his own reliance, rather than that of a third party, was also approved in our discussion in *American Express*, in which we ruled that American Express shareholders lacked standing to bring derivative civil RICO claims for losses the company incurred in connection with its mail fraud, wire fraud, and bribery-based efforts to defame Safra. Although Safra himself plainly could not have relied on the frauds, we stated that

> if appellants are correct that [individual defendants] violated RICO by defaming Safra, then Safra, as the target and victim of the scheme, could sue [them] under RICO and recover treble damages for injuries to his "business or property." *See* 18 U.S.C. § 1964(c).

American Express, 39 F.3d at 401.

In dismissing Ideal's complaint in the present case on the ground that a civil RICO plaintiff who alleges predicate acts of mail or wire fraud has not adequately pleaded transaction causation unless he has alleged that he himself relied on the fraudulent communications, the district court instead relied principally on our decisions in *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-72 (2d Cir. 1999), and *Powers v. British*

Vita, P.L.C., 57 F.3d 176, 189 (2d Cir. 1995). Although those cases contained such language, that language was used in the context of claims brought by plaintiffs who themselves were parties to the transactions that they claimed had been fraudulently induced. In such cases, i.e., where the plaintiff alleges that he was the person deceived, the transaction causation test is not an independent standing requirement but is merely shorthand for part of the normal causation analysis. *Moore* and *Powers* did not deal with circumstances such as those here, in which a plaintiff claims to have been directly harmed by means of a fraud perpetrated on another person, and their statements that the plaintiff must show his own reliance do not control the proximate cause analysis here.

Rather, the principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

In the present case, Ideal alleged facts sufficient to show that its claimed loss of business was proximately caused by defendants' operation of National's stores through a pattern of racketeering activity. According to the complaint, described in Parts I.A. and B. above, defendants' "cash, no tax" scheme was implemented for the purpose of diverting customers from Ideal, which collected the sales taxes required by law, to National, which did not. Given that Ideal and National sell substantially the same products and that their retail stores are but minutes apart, the lower bottom-line cost available to cash

purchasers from National as a result of not paying sales tax influenced some customers to purchase from National rather than from Ideal.

Defendants' mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the "cash, no tax" scheme, for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. The principal intended victim of the scheme was Ideal, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that Ideal, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

2. Investing Racketeering Income in Violation of § 1962(a)

Given the facts alleged in the complaint, we also conclude that Ideal has standing to assert its § 1962(a) claim. A plaintiff may state a civil RICO claim for violation of subsection (a) by alleging that a defendant has received "income derived, directly or indirectly, from a pattern of racketeering activity" and has "use[d] or invest[ed]" any part of that income "directly or indirectly" in an enterprise engaged in interstate commerce, 18 U.S.C. § 1962(a). Under that section, the complaint "must allege injury 'by reason of' defendants' investment of racketeering income in an enterprise," as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the

enterprise. *See Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990).

Here, part of the proceeds of defendants' alleged "cash, no tax" scheme may properly be viewed as racketeering income, indirectly derived from their pattern of mail and wire frauds, given that those frauds enabled defendants to avoid paying 8B< percent of those proceeds to the State. And the complaint alleges that defendants used profits gained from the operation of their "cash, no tax" scheme at National's Queens location to fund the opening of their retail outlet in the Bronx near Ideal's outlet in that Borough. The complaint adequately stated a claim on which relief can be granted under § 1964(c) for a violation of § 1962(a).

C. Defendants' Alternative Arguments for Affirmance

We also reject defendants' contentions that the dismissal of the complaint may be upheld on either of two alternative grounds. First, they contend that we should affirm because the problems of proof inherent in Ideal's theory of causation are intractable, as its business losses may have resulted from any of a number of economic factors unrelated to National's alleged practice of failing to charge and pay sales tax. (*See* Defendants' brief on appeal at 20-22.) The evidentiary difficulty hypothesized by defendants, however, is not a proper basis for a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. *See, e.g., Commercial Cleaning*, 271 F.3d at 382-83; *see also Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (potential difficulty in establishing "chain of causation . . . . is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss").

Second, defendants argue that the judgment of the district court should be affirmed because Ideal failed to allege that defendants' electronic filings were interstate, a jurisdictional element of the wire fraud offense described in § 1343. *See generally Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 243 (2d Cir. 1999) (a § 1343 offense "requires that the defendant communicate by wire in 'interstate or foreign commerce'"; a "purely intrastate communication [is] beyond the statute's reach" (other internal quotation marks omitted)). Defendants argue that because National is located in New York and the allegedly false tax reports were filed within the State, National's electronic tax filings cannot have violated the wire fraud statute. This contention is both substantively and procedurally flawed. As a matter of substance, it is possible for a wire communication whose origin and ultimate destination are within a single state to be routed through another state. *See, e.g., United States v. Davila*, 592 F.2d 1261, 1263 (5th Cir.) (upholding § 1343 wire fraud conviction of a defendant who used Western Union wire transfers to send money between San Antonio and McAllen, Texas, which were routed through Middletown, Virginia), *reh'g denied*, 597 F.2d 283, *cert. denied*, 444 U.S. 843, 100 S. Ct. 85, 62 L. Ed. 2d 56 (1979); *see also United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) (defendant need not know that its wire communication travels through interstate commerce for § 1343 to be applicable), cert. denied, 402 U.S. 945 91 S. Ct. 1629, 29 L. Ed. 2d 114 (1971). As a matter of procedure, the question of whether Ideal will be able to prove that pertinent wire communications by defendants traveled interstate is a matter for trial, not for resolution on a motion pursuant to Rule 12(b)(6). Further, even if it were clear that defendants' wire transmissions were purely intrastate, that would not warrant dismissal of the complaint, for the complaint alleges not only wire fraud but mail fraud. There is no requirement that mail travel interstate

for its sender to violate § 1341. *See, e.g., United States v. Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002).

CONCLUSION

We have considered all of defendant's arguments in support of affirmance and have found them to be without merit. The judgment dismissing the RICO claims is vacated for the reasons stated above. We also vacate the dismissal of the state-law contract claim, over which the district court declined to exercise supplemental jurisdiction because of its dismissal of the RICO claims. The matter is remanded for further proceedings not inconsistent with this opinion.

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No. 04-433

IN THE

Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND NATIONAL STEEL SUPPLY, INC.,
Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether a competitor is "injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act ("RICO") where the alleged predicate acts of racketeering activity were mail and wire fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior.

RULE 29.6 STATEMENT

Petitioner National Steel Supply, Inc. is a privately owned entity. It has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

This case is the most recent episode in a long-running feud between the principals of two closely held corporations. It involves claims brought by respondent Ideal Steel Supply Corp. ("Ideal") under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 — "the litigation equivalent of a thermonuclear device," as civil RICO has been described, *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Ideal's theory is that petitioners National Steel Supply, Inc. and its two owners, Joseph and Vincent Anza (collectively, "National"), are liable for treble damages and attorneys' fees because National engaged in "a pattern of racketeering activity" by allegedly defrauding New York of sales taxes. According to Ideal, National's alleged tax fraud facilitated National's selling of products more cheaply to purchasers who then abandoned Ideal in sufficient numbers that Ideal sold fewer goods and therefore lost profits.

In accepting that Rube Goldberg-esque chain of events as sufficient to overcome National's motion to dismiss — which the district court had granted — the Second Circuit committed grave errors of law and logic that warrant reversal. First, the court below ignored this Court's requirement of a "direct" relation between the RICO predicate act and the plaintiff's claimed injury as an element of proximate cause. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992). The damages allegedly suffered by Ideal here are at least several steps removed in the causal chain and are in any event too attenuated to satisfy *Holmes'* requirement of a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268-69. Ideal also fails to meet the proximate-cause requirement of RICO for the independent reason that it was not the party defrauded by the alleged scheme. As such, Ideal falls outside the purposes of the mail and wire fraud statutes, which form the basis for the predicate acts supporting the asserted violations of RICO. Because the mail and wire fraud statutes were not

intended to protect non-defrauded third parties like Ideal, Ideal cannot, consistent with the common-law requirement of proximate cause that this Court articulated in *Holmes*, recover under civil RICO for violations of those statutes.

Wholly independent of those explanations for why Ideal cannot establish proximate cause, the Second Circuit further erred in allowing Ideal — as a third party to whom National made no misrepresentations — to satisfy the requirement of reliance by invoking the State's reliance on National's alleged fraud. Not only is the Second Circuit's novel theory a departure from the common law, which required reliance by the plaintiff in a fraud action, but it also paradoxically threatens to make a federal RICO action for treble damages far easier to plead than a state-law fraud claim. Nothing in RICO suggests that Congress intended such a result.

If accepted by this Court, the Second Circuit's approach gives a litigation weapon of great destructive force to civil plaintiffs, who can turn common allegations of unfair competitive advantage — which under state law might be difficult to plead and prove — into federal RICO claims. Unleashing civil RICO in all routine commercial suits would upset various federal remedial schemes and federalize garden-variety business tort and contract suits. Because the Second Circuit's holding goes far beyond what Congress intended in enacting RICO and the consequences would be truly profound and deleterious for the American economy, this Court should reverse.

OPINIONS BELOW

The opinion of the court of appeals (JA 32-57) is reported at 373 F.3d 251. The decision and order of the district court (JA 21-31) is reported at 254 F. Supp. 2d 464.

JURISDICTION

The court of appeals entered its judgment on July 2, 2004. The petition for a writ of certiorari was filed on September 29, 2004, and was granted on November 28, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively, are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

1. ***The statutory scheme.*** Congress's purpose in enacting RICO was to eradicate organized crime in the United States. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923; *see also Beck v. Prupis*, 529 U.S. 494, 496-97 (2000) (describing the statutory scheme and Congress's goals in passing it). Congress found that organized crime was "a highly sophisticated, diversified, and widespread activity that annually drain[ed] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." Pub. L. No. 91-452, § 1, 84 Stat. 922. The result was to "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *Id.* at 923. Concluding that the existing "sanctions and remedies available to the Government [were] unnecessarily limited in scope and impact," Congress sought in passing RICO to "strengthen[ ] the legal tools in the evidence-gathering process," to "establish[ ] new penal prohibitions," and to "provid[e] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*

To that end, Congress provided severe criminal penalties for violations of RICO, *see* 18 U.S.C. § 1963, and authorized the Government to bring civil actions to "prevent and restrain" RICO violations, *id.* § 1964(a), (b). Additionally, the statute created a private right of action for treble damages for any person "injured in his business or property by reason of" a RICO violation. *Id.* § 1964(c). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court held that the phrase "by reason of" in § 1964(c) requires a plaintiff to prove that the defendant's RICO violation was both a cause in fact and a proximate cause of its claimed injury. *See id.* at 265-68. In so holding, this Court relied on its prior decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), which interpreted similar statutory language in § 4 of the Clayton Act.

RICO contains four substantive prohibitions. First, § 1962(a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Second, § 1962(b) makes it "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Third, § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Fourth, § 1962(d)

makes it "unlawful for any person to conspire to violate any of the provisions of" § 1962(a), (b), or (c).

Section 1961(1) provides an exhaustive list of acts — commonly referred to as "predicate acts" — that constitute "racketeering activity" under § 1962. That list includes mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. The mail and wire fraud statutes prohibit the use of those means of communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* §§ 1341, 1343. Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

2. ***The facts of this case as alleged in the amended complaint.*** National and Ideal are competitors in the retail sale of steel mill products and related hardware, supplies, and services. They sell those products in a lumber-yard setting to ornamental ironworkers, small steel fabricators, and do-it-yourself homeowners. They each have two stores in New York City, one in the Bronx and one in Queens, each located "a few minutes' drive" from the other. JA 6 (Compl. ¶¶ 2-3).

Generally, the two firms must charge their customers a sales tax, the proceeds of which they remit to the State of New York. *See* N.Y. Tax Law §§ 1101 *et seq.* (McKinney 2004). Several types of sales are exempt from that tax, such as transactions in which the buyer intends to resell the goods in a subsequent taxable sale, *see id.* §§ 1101(b)(4)(I), 1105(a), 1132(c)(1); and purchases by a tax-exempt entity (such as a school or church), *see id.* §§ 1115(a)(15), 1116(a)(4).

According to the allegations in Ideal's amended complaint, National had a practice of not charging sales tax to non-exempt retail purchasers who paid in cash. National allegedly failed to report those cash sales to the New York

State Department of Taxation and to pay the required sales tax on them. *See* JA 6 (Compl. ¶ 4). That conduct, Ideal alleged, gave National "an improper competitive advantage." JA 13 (Compl. ¶ 32). Although Ideal's prices were "the same or lower on average" than National's, when it came to non-exempt cash sales on which National allegedly failed to collect and to pay sales tax, National's "overall cost to customers [was] typically lower than Ideal's for the same goods and services" because Ideal charged customers the sales tax. *Id.* (Compl. ¶ 33). Ideal further alleged that, after National opened a new facility in the Bronx in 2000 — "just eight minutes by automobile" from Ideal's pre-existing Bronx location, *see* JA 10 (Compl. ¶ 20) — Ideal experienced a "steep drop in taxable cash sales" that was "disproportionate to the effect that National's new Bronx location had on Ideal's overall sales." JA 13-14 (Compl. ¶ 35).

3. ***The proceedings below.*** As the magistrate judge below recognized, "there are complications" in this case "beyond just the issues that would appear on the face" of the pleadings. Hearing Tr. at 16, *Ideal Steel Supply Corp. v. Anza*, No. 02 CV 4788 (S.D.N.Y. Nov. 18, 2004). Ideal and National are family-run businesses, and the two families are related. But relations between them have soured, leading to what the magistrate judge described as a "family feud," reminiscent of the "Hatfields and McCoys." *Id.* The parties have aired their disputes in judicial fora before,[1] and this case represents the latest salvo in this long-running feud.

a. Ideal sued National and its two owners, Joseph and Vincent Anza, under civil RICO, 18 U.S.C. § 1964(c), asserting that the Anzas were "person[s]" conducting an "enterprise" (*i.e.*, National) through a pattern of racketeering activity, in violation of § 1962(c). The alleged filings of fraudulent New York State sales tax returns were asserted

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[1] For example, the third claim in this complaint arises out of a prior litigation between these parties.

to be violations of the federal mail or wire fraud statutes (depending on whether they were filed by mail or electronically), thus constituting the necessary pattern of racketeering activity. *See* JA 15-16 (Compl. ¶¶ 45-47). Ideal further alleged that, although the fraud was "perpetrated on the State," it was "directed at and directly injure[d]" Ideal because the conduct was aimed at "increasing National's market share and overall profits" at the expense of its "principal competitor," Ideal. JA 16 (Compl. ¶ 49). As a result, Ideal claimed that it lost "a substantial volume of its taxable cash business," causing a corresponding loss of "a substantial amount of profits and market share." *Id.* (Compl. ¶ 50).

Ideal also asserted a violation of § 1962(a), which prohibits investing "racketeering income" in an "enterprise." It alleged that the Anzas and National were "person[s]" who had invested racketeering income derived from the alleged untaxed sales at National's Queens store in National's new Bronx location (the RICO "enterprise" for this claim). *See* JA 17 (Compl. ¶¶ 55, 56). Ideal claimed that it had "lost significant business and market share" as a result of National's investment in its new Bronx store. JA 17-18 (Compl. ¶ 57).

Ideal sought damages in excess of $5 million for the alleged racketeering activity and in excess of $2 million for the investment of racketeering proceeds, both of which it asked to be trebled under § 1964(c). According to the complaint, the $5 million figure represented profits lost as a result of National's violation of § 1962(c). The complaint did not explain, however, from where it derived the $2 million in damages allegedly caused by the violation of § 1962(a). Ideal also sought attorneys' fees under § 1964(c).

b. National moved to dismiss Ideal's complaint on several grounds, including failure to allege proximate causation. The district court granted National's motion. It concluded that Ideal had not pleaded causation adequately because the complaint did not assert that Ideal relied on National's

alleged fraudulent misrepresentations to the New York State taxing authority. *See* JA 27-30.[2]

c. The court of appeals reversed. The court began its analysis by referencing *Holmes*' proximate-cause requirement and by reviewing a number of its prior cases concluding that indirectly injured plaintiffs could not recover under RICO because their claims did not satisfy that requirement. *See* JA 40-45. The court distinguished those cases from this one, however, because in those cases "the plaintiffs were not competitors of the racketeering enterprise or targets of alleged racketeering activity." JA 46. Additionally, the court acknowledged the general rule that a civil RICO plaintiff alleging violations of the mail and wire fraud statutes must show that it relied on the fraud. *See* JA 51-53. But the court concluded that reliance by a third party, rather than the plaintiff, sufficed. *See* JA 51-54. According to the court,

> the principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

JA 53.

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[2] Ideal's amended complaint also asserted a state-law breach-of-contract claim based on an alleged violation of a settlement agreement resolving prior litigation between the two companies. Having dismissed the civil RICO claim, the district court declined to exercise supplemental jurisdiction over the state-law claim and thus dismissed it without prejudice. *See* JA 30-31.

Applying that principle to the facts of this case, the court of appeals concluded that Ideal's suit should be permitted to go forward. The court explained that a sufficient causal connection between the alleged violation of § 1962(c) and the claimed injury had been asserted:

> [National's] mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the . . . scheme [to avoid charging sales tax on cash sales], for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. The principal intended victim of the scheme was Ideal, over which [National] sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that Ideal, as a competitor directly targeted by [National] for competitive injury, has standing to assert its RICO claims against [National] for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

JA 54. Similarly, the court concluded that Ideal had stated a valid claim based on a violation of § 1962(a). That was because "part of the proceeds of [the alleged] scheme may properly be viewed as racketeering income, indirectly derived from [the] pattern of mail and wire frauds, given that those frauds enabled [National] to avoid paying [8 1/4] percent of those proceeds to the State," and the complaint alleged that National used those profits to fund the opening of National's Bronx location. JA 55. The court of appeals accordingly vacated the district court's dismissal of Ideal's complaint. *See* JA 57.

SUMMARY OF ARGUMENT

I. RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of that statute. 18 U.S.C. § 1964(c). Under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), a civil RICO plaintiff must show that its claimed injury was both actually caused and proximately caused by the defendant's illegal conduct. Ideal cannot establish proximate causation, for two reasons.

First, a "central element[ ]" in the proximate-cause analysis is "directness" — "a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268-69. Directness is important because the less direct an injury, the more difficult it becomes to ascertain the damages "attributable to the violation"; the more likely it is that damages will have to be apportioned among plaintiffs; and the less valuable the whole exercise will be, given that directly injured plaintiffs can bring suit without those attendant problems. *Id.* at 269. Here, Ideal's alleged injury to its business was not direct. The alleged fraud was in National's alleged misrepresentation to New York State tax authorities of the extent of its cash sales. The direct injury from that misrepresentation was an underpayment of sales tax. That injury is easily measured and recovered, with penalties, under New York State law, or possibly even pursued by the State as a plaintiff under RICO.

The damages sought by Ideal, however, are of a different sort, relating not to the fraud at all but to the possible indirect competitive effects of the fraud. Those damages are more speculative, requiring the parties to trace the effects of the alleged tax underpayments on competition between them during the period when the payments were undetected. Those damages might depend, for example, on the extent to which National's non-tax-exempt cash customers would have been willing to switch to Ideal if National began charging tax, or might have still purchased from National,

or might have chosen some other alternative in the market. Under *Holmes*, that effort to trace the possible (and highly attenuated) consequences of a misrepresentation of tax liability should be avoided.

Second, damages recovery under civil RICO for injuries caused by violations of the mail and wire fraud statutes should be restricted to the injury suffered by the party that was defrauded. Doing so is consistent with the traditional common-law principle that a civil plaintiff cannot recover for a violation of a statute unless it is among the persons protected by the law. The mail and wire fraud statutes protect those whom wrongdoers seek to defraud. Thus, only defrauded parties can recover treble damages and attorneys' fees under RICO for violations of those statutes.

The court of appeals decided, however, that Ideal had stated a valid claim because it alleged that it was a competitor "directly targeted" for competitive injury. That subjective "target" approach to the proximate-cause inquiry cannot be reconciled with this Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), on which this Court relied in *Holmes* in articulating civil RICO's proximate-cause requirement. *Associated General Contractors* establishes that a defendant's motive does not provide a basis for subjecting it to liability for losses not proximately caused by its illegal conduct.

II. In any event, even if Ideal could show that its losses were the direct result of National's alleged fraud and overcome the common-law rule restricting recovery to defrauded parties, dismissal of its suit would be required nonetheless. A civil RICO plaintiff alleging fraudulent misrepresentations must show that it relied on the defendant's misrepresentations. Reliance was a requirement for fraud actions at common law and therefore constitutes the background rule against which Congress enacted the RICO private right of action. Accordingly, many courts have adopted a reliance requirement in fraud-based RICO private suits (including

the Second Circuit itself), but the panel below decided that reliance by the New York State tax authorities was sufficient to satisfy that requirement. That holding erroneously derogated from the common law. Although third-party reliance was sometimes recognized at common law, none of the recognized exceptions applies here.

III. To permit this suit to go forward would expand the RICO private treble-damages action beyond what Congress intended, leading to the creation of a federal law of unfair competition. The concept of fraud under the federal mail fraud statute has proved to be extremely elastic. Under the Second Circuit's rule, business firms could seize on a range of conduct engaged in by their competitors, allege some misrepresentation, and seek treble damages for the "unfair competitive advantages" that might have been facilitated by that misrepresentation.

Permitting business rivals to sue for indirect competitive injuries allegedly facilitated by some violation of the mail or wire fraud statutes would upset carefully balanced federal remedial schemes in the areas of tax fraud, accounting fraud, and antitrust. Additionally, the cause of action recognized by the court of appeals would disrupt the federal-state balance in this area by providing a powerful incentive for civil plaintiffs to bring garden-variety tort and contract claims arising out of commercial disputes in federal court under civil RICO. There is no reason to believe that Congress intended such sweeping consequences, particularly when the background common-law rules for proving damages from fraud under the RICO statute require careful analysis of proximate cause and reliance by the plaintiff on the defendant's misrepresentations. Given the presence of state fraud and unfair-competition law, there is no need to relax RICO standards to provide an additional federal treble-damages remedy.

ARGUMENT

I. IN A CIVIL RICO ACTION INVOLVING PREDICATE ACTS OF MAIL AND WIRE FRAUD, A NON-DEFRAUDED COMPETITOR'S LOSS OF BUSINESS IS NOT AN INJURY "BY REASON OF" THE RICO VIOLATION

A. Ideal's Alleged Injuries Do Not Satisfy The Proximate-Cause Requirement Of *Holmes* Because They Are Not Sufficiently Direct

1. *Holmes* requires a direct causal connection between the alleged violation and the claimed injury

RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of that statute. 18 U.S.C. § 1964(c). Drawing on *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), which interpreted functionally identical language in § 4 of the Clayton Act, this Court held in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), that, for a plaintiff to allege an injury "by reason of" a RICO violation, it must plead that the violation was both a cause in fact and a proximate cause of that claimed injury. *See id.* at 265-68. By "proximate cause," the Court meant the "label" that is generically applied to the "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. One such tool, the Court noted, "was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* A plaintiff complaining of harm "from the misfortunes visited upon a third person by the defendant's acts" is generally thought "to stand at too remote a distance to recover." *Id.* at 268-69.

The Court explained that claims based on indirect injuries are not actionable for three reasons. *See id.* at 269-70. First, directness is important because the less direct an injury, the more difficult it becomes to ascertain,

as a factual matter, the correct amount of damages "attributable to the violation." *Id.* at 269. Second, permitting recovery of damages by less directly injured parties increases the chance of multiple recoveries, and hence the need for "complicated rules" to apportion damages among the complaining parties. *Id.* Third, suit by the directly injured party offers the benefit of deterring improper conduct but without the costs involved in permitting less direct plaintiffs to sue. *Id.* at 269-70. This Court made clear that the "directness" inquiry was to be "informed" by those concerns. *Id.* at 272 n.20.

Applying that analysis to the facts of the case, the Court held that the plaintiff's civil RICO suit failed because it could not establish the required element of proximate cause. *See id.* at 270-74. There, the Securities Investor Protection Corporation ("SIPC") sued Holmes, alleging that he had engaged in a scheme to manipulate the stock value of a corporation that he controlled. *See id.* at 263. The stock manipulation perpetrated by Holmes and others had driven two broker dealers into bankruptcy, and the SIPC had been forced to advance nearly $13 million to cover the losses of the customers of those broker dealers. *See id.* at 262-63. In rejecting the SIPC's claim, the Court reasoned that, even if the SIPC were to stand in the shoes of the customers, "the link [was] too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.* at 271.

Additionally, the Court explained that each of the concerns motivating the directness requirement applied. First, "[i]f the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets." *Id.* at 272-73. Second, even if factual causation could be shown, "the district court would then have to find some way to apportion the possible respective recoveries by

the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages." *Id.* at 273. Third, "the law would be shouldering these difficulties despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication." *Id.*

Finally, the Court rejected the SIPC's reliance on RICO's liberal-construction clause, *see* Pub. L. No. 91-452, § 904(a), 84 Stat. 947, on the ground that there was nothing illiberal in its interpretation of the statute. The Court noted that it had not held "that RICO cannot serve to right the conspirators' wrongs," but merely that the SIPC was not a proper plaintiff. 503 U.S. at 274. Indeed, the Court observed, "RICO's remedial purposes would more probably be hobbled than helped by SIPC's version of liberal construction" because "[a]llowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'" *Id.* (quoting *Associated Gen. Contractors*, 459 U.S. at 545) (second through fifth alterations in original).

2. Ideal cannot establish a direct connection between the alleged racketeering activity and its lost profits

a. Ideal has not pleaded the necessary element of proximate cause because it has failed to allege a "direct relation between the injury asserted and the injurious conduct alleged," as required by *Holmes*, 503 U.S. at 268. *See* 1 Kevin P. Roddy, *RICO in Business and Commercial Litigation* § 7.03, at 7-4 (1995) ("[I]f a plaintiff fails to allege and prove that a causal nexus exists between his, her, or its injury and the RICO predicate acts, the plaintiff lacks standing to sue under § 1964(c).").

Ideal averred that National failed to charge sales tax to some of its customers, specifically, those who did not purchase its steel mill products for resale (presumably,

"do-it-yourself" homeowners) and who were able to pay in cash. Ideal further alleged that National then misrepresented the extent of its cash sales to the New York State Department of Taxation and Finance, thereby lowering its sales tax liability. Those misrepresentations, Ideal alleged, constituted a fraud "perpetrated on the State." JA 16 (Compl. ¶ 49).

The causal connection between that alleged illegal conduct and the injury claimed by Ideal — lost profits — is highly attenuated, at best. As an initial matter, Ideal's allegations do not even establish that its claimed injury was in fact caused by National's fraud. In and of themselves, National's alleged fraudulent misrepresentations to the State caused Ideal no injury. Indeed, National could have engaged in all of the illegal conduct that forms the basis of the asserted RICO violation without causing Ideal to lose any profits whatsoever. Instead of charging lower prices, National might simply have retained the unlawful tax savings. And, on the other hand, it certainly was not necessary for National to defraud New York to charge lower prices. National may have had lower costs, or it may have been willing to reduce its profit margin to obtain additional sales.

Ideal cannot establish the required "direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268, merely by pleading that its injury — though caused by legal conduct, the charging of lower prices — was made easier by illegal conduct, alleged acts of mail fraud. The direct effect of the illegal conduct alleged was to deprive New York of tax revenue. Ideal's claimed injury — lost profits — did not directly result from National's alleged tax fraud. Rather, the loss of those profits stemmed from a complex chain of events: The lost profits were caused by lost sales; the lost sales (it is asserted) were the result of National charging lower prices; National charged lower prices (according to Ideal) because it did not collect and remit sales tax; and National (allegedly) submitted false sales tax returns to facilitate its

refusal to charge and pay sales tax. Even if it were assumed that the alleged fraud actually caused Ideal's lost profits, the connection between the two is insufficiently direct to state a claim under *Holmes*. As this Court there explained, plaintiffs cannot seek recovery for indirect injuries because "'"[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step."'" *Id.* at 271-72 (quoting *Associated Gen. Contractors*, 459 U.S. at 534 (quoting in turn *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.))); *see Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (beef producers could not establish proximate cause in civil RICO suit against chicken producer for alleged lost sales caused by fraud in connection with government poultry inspections).

b. Additionally, the concerns animating the directness requirement that this Court identified in *Holmes* each apply here.

i. The principal reason for rejecting the indirect-injury claim in *Holmes* was that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269 (citing *Associated Gen. Contractors*, 459 U.S. at 542-43).

To determine the amount of Ideal's damages, if any, a fact-finder would be required to trace the effects of National's alleged tax underpayments on competition between National and Ideal for the four years (or more) during which National allegedly engaged in that practice. A reduction of 8 1/4% in National's prices (the amount of the sales tax) to cash-paying, non-tax-exempt purchasers does not necessarily mean a lost sale for Ideal, however. First, some of Ideal's lost customers might have switched to National for some reason unrelated to price. Second, some of National's prices might have been lower than Ideal's even without any price reduction attributable to tax underpayments. Even if Ideal were to prove the allegations in its complaint, it

claims only that its prices were the same or lower "on average." JA 13 (Compl. ¶ 33). Third, some of Ideal's lost customers might have chosen sellers other than National. Ideal alleges that the parties' four stores are the only ones in Queens and the Bronx that offer their "comprehensive array of products." JA 9-10 (Compl. ¶¶ 19, 20). But that does not address whether there are substitute sellers in Queens or the Bronx of the particular products that Ideal's lost customers bought or whether the geographic market for the parties' products might extend beyond those two boroughs. Fourth, another potential causal explanation for Ideal's lost profits could be "poor business practices." *Holmes*, 503 U.S. at 273. Tracing out the effects of National's tax underpayments, therefore, would require an understanding of the product and geographic markets within which the parties compete, their pricing and marketing practices, the extent to which their customers' buying decisions were driven by price, and, ultimately, the effect on profitability occasioned by any lost sales.

Such an inquiry would be unduly burdensome and is not the type of extended fishing expedition Congress reasonably would have intended.

ii. The *Holmes* Court also observed that declining to hear claims based on indirect injuries spares courts the trouble of apportioning recovery among the directly and indirectly injured victims, "who would otherwise each be entitled to recover the full treble damages." 503 U.S. at 273. If New York were to take action against National with respect to the allegations of tax evasion at issue here, the district court would be forced to make difficult decisions about the extent to which both the State and Ideal can recover treble damages from National stemming from the same underlying violation.[3]

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[3] Additionally, if Ideal's suit is permitted to go forward, the door would be opened for additional indirect plaintiffs to seek treble damages and attorneys' fees from National. For example, Ideal's suppliers could sue, on the theory that National's alleged fraud reduced *their* profits

iii. The difficulties of proof associated with these complicated questions outweigh the social value in affording Ideal the opportunity to make its case. As this Court recognized in *Holmes*, wrestling with such difficult questions of causation and apportionment "is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." 503 U.S. at 269-70 (citing *Associated Gen. Contractors*, 459 U.S. at 541-42). New York State was the direct victim of the fraud alleged here. In contrast to the complexities involved in ascertaining the amount of damages (if any) suffered by Ideal as an indirect result of National's alleged tax fraud, the extent of the State's injury can presumably be calculated in a rather straightforward way. Once the underpayment of tax liability is discovered, the State could calculate the amount of back taxes owed and then add in any interest and penalties that would also be due. *See* N.Y. Tax Law § 1145 (McKinney 2004). If New York State determined that this was a particularly grievous example of tax fraud, it could also seek criminal penalties against National and its owners. *See id.* § 1817. Although presumably New York State has decided that this statutory structure provides adequate deterrence for tax fraud violations, it might still attempt to pursue civil treble-damages remedies in federal court under RICO, either as an alternative or in addition to any action under state law.[4]

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because a less-profitable Ideal purchased less from those suppliers. The court below offered no support for the notion that Congress intended to permit recovery of full treble damages by a litany of plaintiffs at different levels removed from the same underlying violation.

[4] *Compare Illinois Dep't of Rev. v. Phillips*, 771 F.2d 312, 314 (7th Cir. 1985) (denying motion to dismiss RICO complaint brought by Department of Revenue for treble damages arising out of fraudulent sales tax filings; language of RICO statute "makes no distinction between state governments, consumers, competitors, or other victims in determining who qualifies as a person under the Act"), *with Michigan*

Given the uncertainties inherent in accurately tracing the competitive effects of National's alleged tax underpayments and the availability of the actually defrauded "better plaintiff" to pursue the direct damages from the alleged fraud, *Holmes* requires that Ideal's more speculative business losses be considered indirect. Tax underpayments are the losses proximately caused by this alleged fraud; profits that Ideal might have lost are not.[5]

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v. Fawaz, No. 86-1809, 1988 WL 44736, at *2 (6th Cir. May 9, 1988) (judgment noted at 848 F.2d 194) (fraud in reporting sales tax; defendant already subject of state restitutionary order for taxes and penalties; held: although the State is a "person" for RICO purposes, complaint dismissed because district court should not be a collection agent for unpaid state tax). *Cf. Pasquantino v. United States*, 125 S. Ct. 1766, 1771-72 (2005) (government's right to uncollected taxes is "property" within the meaning of the wire fraud statute); *Georgia v. Evans*, 316 U.S. 159, 162 (1942) (permitting State to bring treble-damages action for its damages from price-fixing; State is a "person injured" under treble-damages provision of Clayton Act).

[5] Although the plaintiff in *Holmes* invoked only § 1962(c) and (d), *see* 503 U.S. at 265 n.9, the directness analysis set forth above applies equally to the second claim in Ideal's amended complaint alleging a violation of § 1962(a). Ideal's only allegation of injury is that it lost profits as a result of lost market share stemming from National's lower prices that were facilitated by alleged mail and wire fraud. Ideal's § 1962(a) theory, therefore, is derivative of the same alleged predicate violations. The connection between Ideal's claimed injury and the underlying predicate violations asserted in its complaint is too attenuated to satisfy § 1964(c)'s proximate-cause requirement as articulated in *Holmes*. Additionally, Ideal's § 1962(a) claim, which alleges that National and the Anzas violated RICO by investing in National's Bronx location, fails because a civil RICO plaintiff does not plead an injury proximately caused by a violation of § 1962(a) merely by alleging that a corporate defendant reinvested profits back into itself. *See, e.g., Brittingham v. Mobil Corp.*, 943 F.2d 297, 304-05 (3d Cir. 1991); *USA Certified Merchants, LLC v. Koebel*, 262 F. Supp. 2d 319, 331 (S.D.N.Y. 2003); *cf. National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994) ("The 'enterprise' referred to in [§ 1962(a) and (b)] is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity[.]"). National's remaining arguments also apply equally to both of Ideal's civil RICO claims.

B. Ideal Cannot Establish Proximate Causation In This Mail And Wire Fraud-Based RICO Suit Because It Was Not The Party Defrauded

In any event, even if Ideal's alleged injury were sufficiently direct to satisfy *Holmes*, its complaint would still fail to allege the required element of proximate cause. A civil RICO plaintiff whose suit is based on predicate acts of mail or wire fraud cannot prove proximate causation unless it can show that it was defrauded by the defendant. Consequently, because the State of New York was the party allegedly defrauded by National's purported violations of the mail and wire fraud statutes — and not Ideal — Ideal has failed to plead proximate causation.

In *Holmes*, this Court "adopted common-law approaches to decide when RICO authorizes recovery for derivative injuries." *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995) (Easterbrook, J.). A settled principle of common law is that "[a] plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Id.* (citing W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 728 (5th ed. 1984) ("*Prosser & Keeton on Torts*")); *accord* 1 J. G. Sutherland, *A Treatise on the Law of Damages* § 32, at 124 (4th ed. 1916) ("Whenever an action is brought for breach of duty imposed by statute the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another and the advantage to be derived to the party complaining of its breach from its performance is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action.").

The mail and wire fraud statutes were intended to protect those whom wrongdoers seek to defraud. *See Cleveland v. United States*, 531 U.S. 12, 18-19 (2000) (noting that " 'the original impetus behind the mail fraud statute was to

protect the people from schemes to deprive them of their money or property' ") (quoting *McNally v. United States*, 483 U.S. 350, 356 (1987)); *see also Israel Travel*, 61 F.3d at 1258 ("the victims of the fraud are the object of solicitude; § 1341 does not establish a regimen of truth-telling without regard to details like who is losing out and why"). Accordingly, in *Israel Travel*, the Seventh Circuit upheld the dismissal of a suit by a company that alleged that its competitor had (successfully) defrauded potential customers in seeking their business (resulting in lost sales for the company). *See id.* The court explained that § 1341 "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Id.*[6]

A similar concern animated this Court's proximate-cause analysis in *Associated General Contractors*. There, the Court also examined the "nature of the plaintiff's alleged injury" to determine whether it was related to the purpose of the statutory right the plaintiff sought to vindicate. 459 U.S. at 538. The Court held that a labor union's suit could not proceed because the union was complaining about effects in the market for building contracting and subcontracting rather than in any market for labor services, *see id.* at 527 & n.14, and it was unclear how promoting competition in that market would advance the union's objectives, *see id.* at 539. Because the purpose of an antitrust claim is to advance consumer welfare through marketplace competition, the proximate cause analysis confined the damages recovery to less than all of the consequences that the defendant's conduct might have produced.

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[6] *Cf. Holmes*, 503 U.S. at 286-90 (Scalia, J., concurring in the judgment) (concluding that RICO incorporates the common-law zone-of-interests requirement, which looks to whether "the plaintiff is within the class of persons sought to be benefitted by the provision at issue"); *Newton*, 207 F.3d at 447 (zone-of-interests test suggests that only consumers have standing to sue chicken producer for alleged fraud in connection with government poultry inspections).

In *Associated General Contractors*, the Court's concern for whether the labor union's injury was "of the type that the antitrust statute was intended to forestall," *id.* at 540, was connected to the separate inquiry into "antitrust injury" required for private-party standing under the antitrust laws. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Although there is no analogue to "antitrust injury" in RICO, *see Holmes*, 503 U.S. at 269 n.15 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985)), the connection between the purpose of the underlying predicate statute and the plaintiff's injury is relevant as part of RICO's proximate-cause inquiry. That aspect of the requirement of proximate cause in RICO private treble-damages actions informs the extent to which the law confines the scope of liability for consequential injury.

Because the asserted fraud was "perpetrated on the State," JA 16 (Compl. ¶ 49) — and not Ideal — Ideal cannot establish that its claimed injury was proximately caused by the alleged illegal conduct of National.

C. The Court Of Appeals' "Target" Test Erroneously Focuses On The Defendant's Purported Motive And Ignores The Required Objective Inquiry Into The Connection Between The Violation And The Injury

Here, the court of appeals ignored this Court's articulation of RICO's proximate-cause requirement in *Holmes*, erroneously substituting a "target" test for the proximate-cause inquiry mandated by *Holmes*. *See* JA 54 ("a competitor directly targeted . . . for competitive injury" can assert fraud-based RICO claims).

This Court's decision in *Associated General Contractors* confirms that a "target" test is not an appropriate substitute for the proximate-cause inquiry required by *Holmes*. There, the plaintiff labor union brought an antitrust suit against an association of building and construction contractors for allegedly coercing landowners, their own members, and other general contractors to deal with non-union

subcontracting firms. Although the defendants did not boycott the union, the lower court found that the defendants "specifically intended" to harm the union and its members by engaging in the boycotting activities. *See* 459 U.S. at 525. Nevertheless, this Court held that the union did not have standing to bring suit. Articulating the proximate-cause approach on which *Holmes* later drew, the Court pointed out that " '[t]he availability of the [Clayton Act] § 4 remedy . . . is not a question of the specific intent of the conspirators.' " *Id.* at 537 (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982)). Instead, factors other than motive should be "of controlling importance." *Id.* at 537 n.37, 538. The factors used by the Court focused on the objective inquiry subsequently mandated for RICO treble damages in *Holmes*, including the "remote" and "speculative" character of the alleged economic harm, *id.* at 545 n.52, and the existence of "more direct victims" of the alleged boycott, *id.* at 545. For those reasons, and despite the intent of the defendants to harm the union, the Court held that the union had no standing to bring its antitrust suit. *See id.* at 545-46.

For the foregoing reasons, the Second Circuit's judgment should be reversed with instructions to dismiss this case. Ideal simply cannot plead the requisite proximate causation to sustain a civil RICO suit based on allegations that National engaged in a scheme to defraud the State.

II. IN A MAIL AND WIRE FRAUD-BASED CIVIL RICO SUIT, A PLAINTIFF MUST SHOW THAT IT RELIED ON THE MISREPRESENTATION TO BE INJURED "BY REASON OF" A VIOLATION OF THE STATUTE

Wholly independent of the contentions in Part I, the judgment below should be reversed because Ideal did not rely on the allegedly fraudulent statements of National. The court of appeals recognized that Ideal has not alleged the element of reliance, *see* JA 53-54, and Ideal has conceded that fact, *see* Br. in Opp. 3. Additionally, the court of

appeals acknowledged (as it had held in other cases, *see, e.g.*, *Bank of China v. NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004), *cert. dismissed*, 126 S. Ct. 675 (2005)) that civil RICO plaintiffs generally must establish reliance when their claims are based on allegations of fraudulent misrepresentations. *See* JA 53. Nevertheless, the court of appeals concluded that the reliance requirement was satisfied by Ideal's allegation that *the State of New York* relied on the alleged fraudulent misrepresentations in National's sales tax returns. *See* JA 54. That conclusion erroneously disregards the requirement of reliance by the plaintiff, which is an element of a private fraudulent-misrepresentation claim under RICO.

A. Reliance In Misrepresentation Cases Is Required By Common-Law Principles That Inform The Elements Of Private Claims Under RICO

1. This Court looks to the common law in interpreting RICO's private right of action

a. RICO creates a cause of action for those injured "by reason of" conduct that violates various federal statutes — relevant here, the mail and wire fraud statutes. *See* 18 U.S.C. § 1964(c). This Court's decisions establish that the elements of that cause of action derive from the common law. In *Holmes*, this Court held that the phrase "by reason of" "carries a [common-law] proximate-cause requirement within it." 503 U.S. at 266 n.12. In doing so, this Court relied on *Associated General Contractors*, which looked to the common law of torts in determining that the Clayton Act's treble-damages provision permits recovery only for proximately caused losses, *see* 459 U.S. at 533-34. Thus, "*Holmes* called for the use of common-law analogies under 18 U.S.C. § 1964(c)." *Israel Travel*, 61 F.3d at 1257.

The propriety of interpreting RICO's private right of action in light of settled common-law principles was further confirmed by this Court in *Beck v. Prupis*, 529 U.S. 494

(2000). There, the Court considered a civil RICO action alleging a conspiracy in violation of § 1962(d). The Court explained that that case did not "present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation." *Id.* at 501 n.6. Accordingly, the Court turned to the "well-established common law of civil conspiracy." *Id.* at 500-01. Similarly, here, this Court must determine the meaning of a civil cause of action for fraud. Thus, this Court should analyze the common law of fraud, just as it looked to the common law of conspiracy in *Beck*.

Examination of the common law of fraud in determining the elements of Ideal's claims accords with this Court's consistent practice of drawing on common-law understandings to interpret statutory terms and concepts — like fraud — "that have accumulated settled meaning under . . . the common law" on the ground that the "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Field v. Mans*, 516 U.S. 59, 69-70 (1995) (interpreting Bankruptcy Code provisions barring discharge of debts resulting from "actual fraud" to require that the creditor need show only "justifiable reliance" on the fraud) (internal quotation marks omitted; ellipsis in original). Accordingly, this Court has turned to the common law when interpreting the mail and wire fraud statutes. In *Neder v. United States*, 527 U.S. 1 (1999), the Court construed the mail, wire, and bank fraud statutes to require proof that the misrepresentation or omission was material, despite the fact that the statutes do not mention such a requirement, explaining that "the common law could not have conceived of 'fraud' without proof of materiality." *Id.* at 22. And last Term in *Pasquantino v. United States*, the Court interpreted the meaning of "property" in the wire fraud statute and assessed whether prosecution under that statute of a scheme to defraud Canada of cigarette tax revenues conflicted with the "background" common-law revenue rule, which is not

referred to in the wire fraud statute. The Court concluded that "common law of fraud" confirmed that the right to receive tax revenues is "property" within the meaning of the statute and that the scope of the wire fraud statute does not conflict with the common-law revenue rule. *See* 125 S. Ct. at 1771-72, 1774.

b. The common law requires reliance in actions, like this one, involving fraudulent misrepresentations. At common law it was well accepted that in an action for fraud or deceit, whether by misrepresentation or omission, the plaintiff was required to prove reliance. *See, e.g., Prosser & Keeton on Torts* at 728 (elements of tort action in deceit that have "emerged from this [common-law] process of development" include "intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation"); Leon Green, *Deceit*, 16 Va. L. Rev. 749, 750 (1930) (false representation must be made "for the purpose of inducing the plaintiff to act" and "the plaintiff was induced thereby to act"); *see also Ming v. Woolfolk*, 116 U.S. 599, 602-03 (1886) (citing cases); *Black's Law Dictionary* 788 (4th ed. 1951) (defining fraud as "intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing"). The *Restatement (Second) of Torts* (1977) articulates the requirement as follows: "One who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." *Id.* § 525.[7]

c. This Court's decision in *Neder* is not to the contrary. There, the question was whether, in a prosecution of a "scheme to defraud" under the federal mail, wire, or bank

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[7] This Court has characterized the *Restatement (Second) of Torts* as "the most widely accepted distillation of the common law of torts," *Field*, 516 U.S. at 70, and has quoted section 525 approvingly for its definition of the elements of the common law of deceit, *see Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1632 (2005).

fraud statutes, the Government must prove a "material" misrepresentation. Although the Court found nothing to "rebut th[e] presumption" that Congress intended to incorporate the common-law materiality requirement into the meaning of the term "scheme to defraud," 527 U.S. at 23, the Court also acknowledged that the criminal fraud statutes "did not incorporate *all* the elements of common-law fraud," pointing specifically to "justifiable reliance" and "damages," *id.* at 24-25. The Court explained that the fraud statutes only prohibit a "scheme to defraud," not the completed crime. Thus, requiring proof that the victim relied and suffered actual damages "would clearly be inconsistent with the statutes Congress enacted." *Id.* at 25.

Nothing in *Neder* suggests that requiring proof of reliance (or proof of actual damages) would be "inconsistent" with RICO's private right of action. In contrast to the criminal statute that this Court interpreted in *Neder*, the provision at issue here creates a private cause of action for damages. Indeed, the *Neder* Court recognized that crucial distinction between civil actions and criminal actions: Although it stated that proof of damages was not required in a criminal prosecution under the mail fraud statute, this Court quoted Judge Learned Hand for the proposition that " '[c]ivilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability.' " *Id.* (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)) (second alteration in original). Because nothing in civil RICO indicates that Congress intended to permit private parties to recover damages for violations of the mail and wire fraud statutes without proving the common-law elements of fraud, this Court should look to those elements in defining the cause of action at issue here.

2. A reliance requirement in misrepresentation cases is consistent with the text of § 1964(c)

RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason

of" a violation of that statute. 18 U.S.C. § 1964(c). This Court held in *Holmes* that, for a plaintiff to allege an injury "by reason of" a RICO violation, it must plead that the violation was both the cause in fact and the proximate cause of that claimed injury. *See* 503 U.S. at 265-68. When the alleged racketeering activity is mail and wire fraud involving misrepresentations, a plaintiff cannot establish the causal connection required by the text of § 1964(c), as interpreted in *Holmes*, without proof of reliance. If the recipient of the fraudulent misrepresentation knew that the representation was false and did nothing about it, or would have done nothing about it if it had known of the falsity, the misrepresentation did not cause the recipient any harm because the outcome would have been the same if it had not occurred. Thus, in the ordinary misrepresentation case, the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of § 1964(c). *See Restatement (Second) of Torts* § 546 ("causation in fact" for fraudulent misrepresentations shown when recipient "justifiably relies" on them); *cf. Field*, 516 U.S. at 66 ("[n]o one, of course, doubts that some degree of reliance is required to satisfy the element of causation inherent in" Bankruptcy Code provision that prohibits the discharge of debts for money or property "obtained by" fraud); *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988) (observing that, in securities-fraud suits, "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury").

3. The courts of appeals are nearly unanimous in requiring reliance

Because of the textual and common-law underpinnings of a reliance requirement, the courts of appeals have generally agreed that a plaintiff in a fraud-based RICO case must show that it relied on the defendant's misrepresentation. *See, e.g., Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir. 2002) (to prove injury in "a civil RICO case predicated upon mail or wire fraud," plaintiff must prove that he "relied to his detriment on misrepresentations made in

furtherance of that scheme") (internal quotation marks omitted); *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 560-62 (5th Cir. 2000) ("[m]ost other circuits" require showing of detrimental reliance by the plaintiff; court imposes a "general requirement" of reliance, while suggesting an exception if plaintiff was the "target" of the fraud); *Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (for a cognizable claim for fraud under RICO, plaintiffs must show a material misrepresentation and "that plaintiffs in fact relied upon that material misrepresentation"); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) ("where fraud is alleged as a proximate cause of the injury, . . . the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation"); *Appletree Square I, Ltd. P'shp v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994) (fraud-based RICO suit fails because plaintiff did not show it "detrimentally relied on any of the alleged misrepresentations").

One court of appeals has indicated, however, that reliance is simply a way to show proximate causation and, as such, can be dispensed with when there are other ways to show that the defendant's action caused the plaintiff's injury. *See Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002) ("[r]eliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way"; plaintiffs' harm was "a reasonably predictable consequence" of defendant's misrepresentations) (case dismissed for lack of showing of pattern of racketeering). That approach, however, erroneously conflates reliance and proximate cause in fraud-based civil RICO claims. Unless the concept of recovery for fraud is to be "unmoor[ed]" from its common-law meaning — which it is not, *Neder*, 527 U.S. at 23-24; *see Beck*, 529 U.S. at 500-01 & n.6; *Holmes*, 503 U.S. at 265-74 — a plaintiff must prove that it actually relied on the fraudulent misstatements and that the defendant's conduct was a proximate cause of the plaintiff's injury. *Cf. Dura Pharm.*, 125 S. Ct. at 1631 (requiring proof of both reliance

and proximate cause to recover damages for securities fraud).

B. Third-Party Reliance Of The Type Permitted By The Court Of Appeals Is Not An Adequate Substitute For Reliance By The Plaintiff Because It Is Unprecedented Under The Common Law

Even though Ideal did not rely on the alleged misrepresentations of National, the court of appeals held that a plaintiff, like Ideal, can bring a mail and wire fraud-based RICO claim "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." JA 53. That judgment is erroneous because it expands RICO claims predicated on fraudulent misrepresentations far beyond the common-law moorings of fraud-based claims.

At common law, as a general rule, recovery for deceit was confined to plaintiffs who relied on the defendant's misrepresentations. As the *Restatement (First) of Torts* (1938) explained:

> The maker of a fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by his reliance upon the truth of the matter misrepresented if his justifiable reliance upon the misrepresentation is a substantial factor in determining the course of conduct which results in his loss.

Id. § 546. *See also Restatement (Second) of Torts* § 546 ("[t]he maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented"); *id.* § 531 ("[o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation"); *id.* cmt. b ("For a misrepresentation to be a cause in fact of the

pecuniary loss that results from the plaintiff's action or inaction, the plaintiff must have relied upon the misrepresentation in incurring the loss.").[8]

In certain circumstances, the common law allows recovery when misrepresentations were made by a defendant to a third party, but only when (1) those misrepresentations

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[8] Thus, courts have consistently described the requirements for a common-law fraud action as including reliance by the plaintiff, and they have rejected claims where a non-relying party was suing, even if that party was harmed as a result of the fraud. *See, e.g., Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) ("We hold that a plaintiff does not establish the reliance element of fraud for purposes of ERISA or New York law by showing only that a third party relied on a defendant's false statements."); *Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445, 449-50 (2d Cir. 1975) ("[a] third party [who did not receive the misrepresentation from the defendant] can recover damages for a fraudulent misrepresentation if he can establish that he relied upon it to his detriment"); *McKenzie v. Comcast Cable Communications, Inc.*, 393 F. Supp. 2d 362, 375-76 (D. Md. 2005) (under Maryland law, liability for fraudulent misrepresentations made to defraud a third party requires proof that defendant intended to induce plaintiff's reliance on the misrepresentations and proof that plaintiff did reasonably rely); *Fromer v. Yogel*, 50 F. Supp. 2d 227, 244 (S.D.N.Y. 1999) (dismissing New York state-law claim for negligent misrepresentation because plaintiffs did not allege "that they in any way relied on the alleged misrepresentations made by Defendants to other potential investors"); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 39 n.8 (S.D.N.Y. 1992) ("Plaintiff's claim that the alleged infringement perpetrated a fraud on the copyright office or on the general public is a claim based on misrepresentations to and reliance by third parties and thus, does not constitute a claim for fraud."), *aff'd*, 23 F.3d 398 (2d Cir. 1994) (Table); *Escoett & Co. v. Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929, 929 (App. Div. 1st Dep't 1969) ("The representations of which the defendant complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it."). Although cases can be found accepting claims based on third-party reliance, *see, e.g., Buxton Mfg. v. Valiant Moving & Storage, Inc.*, 657 N.Y.S.2d 450, 454 (App. Div. 2d Dep't 1997) ("[f]raud . . . may also exist where a false representation is made to a third party, resulting in injury to the plaintiff"), when ascertaining the content of the common law, this Court looks to "the general common law of torts, the dominant consensus of common-law jurisdictions, rather than the law of any particular State," *Field*, 516 U.S. at 70 n.9.

were communicated to the plaintiff; (2) the plaintiff relied on them; and (3) the defendant anticipated that the plaintiff would receive and rely on the misrepresentations. *See Restatement (Second) of Torts* § 533 ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation . . . is made to a third person and the maker intends or has reason to expect that" it will be "communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved."); *see also Prosser & Keeton on Torts* at 743-45.[9] But neither the drafters of the *Restatement (Second) of Torts* nor the leading commentators have even contemplated the possibility that a defendant could be liable to a plaintiff who did not rely on misrepresentations made to a third party.

Although the common law generally does not permit non-relying third parties to recover for misrepresentations, a few cases do allow such recoveries, but those limited

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[9] Cases of that type have arisen for more than a century. *See, e.g., Eaton, Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 33-34 (1880) (action in deceit for misrepresentations made by defendant to credit agency; allowing recovery by plaintiff who extended credit in reliance on agency's report because the misrepresentations were intended to be communicated to such persons). Modern cases continue to address the issue. *See, e.g., Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000) ("Indirect reliance allows a plaintiff to prove a fraud action when he or she heard a statement not from the party that defrauded him or her but from that party's agent or from someone to whom the party communicated the false statement with the intention that the victim hear it, rely on it, and act to his or her detriment."); *Clark v. McDaniel*, 546 N.W.2d 590, 593-94 (Iowa 1996) (allowing suit by subsequent buyer against original seller of used car for misrepresenting year of back half of car; seller could expect misrepresentation to be passed on and subsequent buyer justifiably relied on the fraudulent dating); *Geernaert v. Mitchell*, 37 Cal. Rptr. 2d 483, 485 (Cal. Ct. App. 1995) (allowing suit by subsequent house purchaser who relied on misrepresentations made to earlier purchaser; "defendant will not escape liability if he makes a misrepresentation to one person *intending* that it be repeated and acted upon by the plaintiff").

exceptions involve circumstances not present here. Perhaps the most obvious example is that, when the agent was the relying party, the principal was allowed to sue. *See* William L. Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231, 240-41 (1966) (citing cases); *Restatement (Second) of Agency* § 315 (1958) (permitting suit "whether the fraud is practiced upon the agent or upon the principal"). Other cases have allowed suit by a child where the parent relied, *see, e.g.*, *Ruffing v. Union Carbide Corp.*, 764 N.Y.S.2d 462 (App. Div. 2d Dep't 2003) (misrepresentation of safe working environment; child plaintiff subsequently born with birth defects), *appeal dismissed*, 1 N.Y.3d 621 (2004); or suit by a plaintiff that had relied on the valuation of an appraiser that had been deceived by the defendant, *see Union Carbide Corp. v. Montell N.V.*, 9 F. Supp. 2d 405, 411-12 (S.D.N.Y. 1998) ("third party effectively acts as proxy for both sides"; finding efficiency justification for "exception to the general rule" that the plaintiff itself must have relied on the defendant's misrepresentations). Although in those cases the relying parties were not technically agents, they were still acting on behalf of the plaintiff and the fraudulent transaction was still directly connected to the plaintiff's injury.

The rule adopted here by the court of appeals, however, is not confined to those narrow exceptions, but rather permits any non-relying plaintiff to sue for misrepresentations on which some other party allegedly relied, so long as the plaintiff claims that the defendant targeted the plaintiff for harm and that the fraudulent conduct was an "essential part" of the alleged scheme. *See* JA 54. Because that rule runs afoul of the common-law principles underlying fraud-based civil RICO actions, this Court should reject it.

III. TO PERMIT THIS SUIT TO GO FORWARD WOULD UNDULY EXPAND THE SCOPE OF THE PRIVATE RICO TREBLE-DAMAGES ACTION

RICO "has already 'evolv[ed] into something quite different from the original conception of its enactors,' warranting 'concern[s] over the consequences of an unbridled reading of the statute.'" *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 412 (2003) (Ginsburg, J., concurring) (quoting *Sedima*, 473 U.S. at 500) (alterations in original); *see* Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002) (the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context"). Yet the unbridled reading of the court of appeals in this case, which permits a competitor to bring a fraud-based RICO claim against a rival for conduct the competitor alleges created a "competitive advantage" for that rival, augurs a sweeping expansion of the RICO private treble-damages remedy.

The elasticity of fraud as a legal concept has long been recognized. *See, e.g., Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (scheme to defraud is judged by a standard that is a reflection of "moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society"); 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 200 (13th ed. 1886) ("[i]t is not easy to give a definition of Fraud . . . and it has been said that these courts have, very wisely, never laid down as a general proposition what shall constitute fraud"). The mail and wire fraud statutes — violations of which form the predicate acts alleged in "[t]he vast majority of civil RICO cases," Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time For Congress To Act*, 43 Vand. L. Rev. 673, 678 (1990) — correspondingly cover wide swaths of conduct. Recognizing that breadth, Chief Justice Rehnquist questioned "[w]hether it is a good idea to have a civil

counterpart for wire fraud and mail fraud" at all, considering that, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud — which applies to all telephone calls — have a much wider sweep now than they did when the statutes were enacted." Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 9-10 (1989).

Acceptance by this Court of the Second Circuit's approach below would join the elasticity of the fraud statutes to the RICO statute, and then loosen RICO's proximate-cause standard and eliminate the common-law requirement of reliance by the plaintiff. Such a rule threatens to create a new federal law of "unfair competition," complete with treble damages and attorneys' fees. That expanded civil RICO cause of action would upset carefully balanced federal remedial schemes in various areas of the law and would disrupt the federal-state balance by transforming routine state-law tort claims into federal civil RICO actions. Congress could not have intended such far-reaching and disruptive consequences.

A. The Second Circuit's Rule Would Upset The Remedial Balance In The Tax-Fraud And Antitrust Fields And Would Open The Floodgates For Civil RICO Claims Based On Allegations Of Accounting Fraud

Tax-fraud. The most obvious type of case to which this decision will apply is other kinds of tax cases. Tax fraud is broader than the sales tax issue involved here; many business firms find themselves facing a variety of tax-liability issues. Whether those tax issues might actually constitute tax fraud, under the Internal Revenue Code or state tax laws, would not be dispositive in a civil RICO case. The critical question would be whether the filing of inaccurate tax forms would constitute a "scheme to defraud" under the mail fraud statute. If the judgment below is affirmed, it will be hard to argue that such filings do not. *See United States v. Busher*, 817 F.2d 1409, 1412 (9th Cir. 1987)

(mailing fraudulent tax returns can be a predicate act of mail fraud under RICO, even though RICO does not include tax fraud as a predicate act) (citing cases); *see also Illinois Dep't of Rev.*, 771 F.2d at 316-17 (permitting State to sue for treble damages arising out of fraudulent sales tax filings); *cf. Pasquantino*, 125 S. Ct. at 1771-72 (government's right to uncollected taxes is "property" within the meaning of the wire fraud statute).

The concern for expanding claims of the sort allowed by the Second Circuit in this case to underpayment of federal taxes is not fanciful. Following the filing of the petition for a writ of certiorari in this case, Ideal moved to amend its complaint to include an allegation that National had engaged "in an 'income tax free sales' scheme . . . to gain a competitive advantage over Ideal 'by [knowingly] filing false income tax returns and defrauding the Internal Revenue Service and the New York State Department of Taxation and Finance.'" *Ideal Steel Supply Corp. v. Anza*, No. 02 CV 4788, 2005 U.S. Dist. LEXIS 6781, at *3 (S.D.N.Y. Apr. 18, 2005) (brackets in original).[10] Without regard to the very different (and even less direct) effects of underpayment of income tax, that subsequent filing shows how easy it will be for other competitors to complain that their rivals are gaining an unfair competitive advantage by underpaying their federal and state income taxes.

Antitrust. The court of appeals' rule creates an incentive to recast antitrust cases as mail fraud-based RICO claims so as to avoid the antitrust standards that this Court has articulated in recent years for competitor complaints. Two recent decisions of this Court illustrate the havoc that would be wreaked if civil RICO were regularly employed by business rivals.

First, in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), the plaintiff sued its competitor and NYNEX for a

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[10] The second amended complaint is not part of the record before this Court.

conspiracy in which NYNEX paid the plaintiff's competitor higher prices, "hoodwink[ed]" the New York Public Service Commission ("PSC") by passing on the high prices through rates approved by the PSC, and then received a year-end rebate from the competitor. *Id.* at 131-32. Discon sued NYNEX for engaging in a boycott of its premises equipment-removal services. The Second Circuit had held that boycott to be *per se* unlawful, but this Court reversed, holding that the boycott should be assessed under a rule of reason, which would permit full consideration of the competitive effects of the conduct in question. The Court explained as follows:

> To apply the *per se* rule here — where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud — would transform cases involving business behavior that is improper for various reasons . . . into treble-damages antitrust cases. And that *per se* rule would discourage firms from changing suppliers — even where the competitive process itself does not suffer harm.
>
> The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. . . . At the same time, other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." 3 P. Areeda & H. Hovenkamp, Antitrust Law ¶651d, p. 78 (1996). Thus, this Court has refused to apply *per se* reasoning in cases involving that kind of activity. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); 3 Areeda & Hovenkamp, *supra*, ¶651d, at 80 ("[i]n the presence of substan-

> tial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, [but] it is wrong categorically to condemn such practices . . . or categorically to excuse them").

525 U.S. at 136-37 (internal and parallel citations omitted; alterations in original).

The second case is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). In *Trinko*, this Court upheld the dismissal of a suit by a consumer of telecommunications services who alleged that Verizon had violated § 2 of the Sherman Act by breaching its duty under the Telecommunications Act of 1996 to share its facilities with its competitors. Verizon's conduct had been examined by the Federal Communications Commission and the New York PSC, both of which had imposed financial penalties for noncompliance, along with remedial measures. *See id.* at 403-04. In finding no violation of the antitrust laws, this Court noted that antitrust analysis "'must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies,'" *id.* at 411 (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.)), and that, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct," *id.* at 407 (emphasis omitted).

The care with which this Court approached the allegedly anticompetitive behavior in *Discon* and *Trinko* would not be duplicated in a mail fraud-based civil RICO litigation. The regulatory fraud in *Discon*, readily translatable into a fraud complaint, would not be weighed under a rule-of-reason approach. The only question would be the financial impact on the competitor, not the impact on competition as tested under a rule of reason. Similarly, it would be easy for a competitor of Verizon to allege misrepresentations in Verizon's statements to regulators and seek treble damages for lost revenue. *See* Brief for Covad Communications

Company, Inc. as *Amicus Curiae* in Support of Respondent, *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), 2003 WL 21755938 (competitor of Verizon alleging misrepresentations by Verizon to state commissions regarding availability of space in central offices for collocating facilities). The impact of such liability on incentives to invest in new facilities, however, would go unexplored in a RICO suit.

Accounting fraud. Affirming the court of appeals in this case would open the door to a flood of suits by competitors of any corporation accused of accounting malfeasance. Accounting fraud has been at the heart of the major corporate scandals of the past few years, involving a long list of companies such as Enron, WorldCom, HealthSouth, and Tyco.[11] Competitors of those corporations no doubt felt that the fraud allowed the companies to gain a "competitive advantage" over them. Indeed, following the initial revelation of MCI's accounting fraud, it was suggested that "the most far-reaching effects of the financial shenanigans at companies like WorldCom, Global Crossing and Qwest were the dislocations and costs they caused for the companies that tried to compete with them," with competitors complaining that "competing against WorldCom for the attention of investors and Wall Street analysts in recent years was essentially like running track against an athlete who is later discovered to be using steroids." Seth Schiesel, *Trying to Catch WorldCom's Mirage*, N.Y. Times, June 30, 2002, at Sec. 3, p. 1; *see* Joseph Bower & Stuart Gilson, *The Social Cost of Fraud and Bankruptcy*, Harv. Bus. Rev., Dec. 2003, at 20 (if WorldCom had priced to actually earn what it reported, a "crude estimate" suggests industry could have

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[11] Of course, as this Court noted in *Holmes*, 503 U.S. at 273, those directly injured by accounting frauds like those perpetrated by WorldCom — investors — can be counted on to bring suit to obtain compensation for harms caused by, and thereby to deter, such fraud. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267 (S.D.N.Y. 2003), *appeal granted in part sub nom. Hevesi v. Citigroup, Inc.*, 366 F.3d 70 (2d Cir. 2004).

yielded "an extra $40 billion in revenue"). The expansion of RICO standing permitted by the court of appeals in this case would provide an opportunity for future competitors that thought they were disadvantaged by fraudulent accounting practices to use the federal courts to repair their economic position.

Federal remedies for the problems of anticompetitive conduct and accounting fraud already exist, and government has ample tools to address tax fraud. Expanding civil RICO to allow competitors to invoke the mail and wire fraud statutes in those areas will provide a new federal claim for injury, one that focuses on competitive advantage "unfairly" obtained through a scheme to defraud. There is no reason to believe that Congress intended to create such a right when it provided treble damages for fraud-based RICO claims, particularly when the background common-law rules for proving damages from fraud under the RICO statute require careful analysis of proximate cause and reliance by the plaintiff on the defendant's misrepresentations. Indeed, it would be particularly ironic in antitrust cases if RICO's private treble-damages provision, modeled as it was on the antitrust laws, were interpreted in a way that permits the purposeful evasion of those very laws.

B. Allowing Non-Defrauded Competitors To Sue Under RICO Would Transform Run-Of-The-Mill State-Court Disputes Between Business Rivals Into Federal Civil RICO Actions

As the foregoing section suggests, upholding the Second Circuit's approach could widely expand the scope of civil RICO's reach. Products liability offers just one example of an area of state law that could conceivably be federalized by this Court's acceptance of the court of appeals' approach. Products-liability claims often involve misstatements to various parties, from regulators to Congress to initial customers. *See, e.g., Summit Props.*, 214 F.3d at 558 (marketing campaign for defective plumbing system was directed at building code approval officials, members of the building

industry such as builders and plumbers, and other consumers). Indeed, courts have already suggested that competitors could bring such suits under the type of theory adopted by the court of appeals in this case. *See id.* at 561 (suggesting, in dictum, that "defendants' competitors might recover for injuries to competitive position" if they alleged that they were the "target" of the fraud). The consequence of upholding the Second Circuit's decision in this case would be to increase the likelihood that such suits will be transformed into civil RICO suits alleging mail and wire fraud as predicate acts, brought by competitors disadvantaged by any competitive advantage secured from marketing products that subsequently turn out to be defective. *See id.* at 557 (retaining the general rule that reliance by the plaintiff is required because to do otherwise would "read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality").

State laws regarding fraud and unfair competition already permit competitors to complain about unfair competitive advantage gained from misrepresentations. *See, e.g.*, N.Y. Gen. Bus. Law § 349 (McKinney 2004) (deceptive acts or practices). Keeping such claims within the ambit of state law would recognize the ability of States to experiment in this area "without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Under the court of appeals' holding, by contrast, any commercial enterprise seeking an advantage over its competitor could bring a civil RICO action, with the attendant *in terrorem* effect of a prayer for treble damages and attorneys' fees, based on any allegation that the competitor had obtained financial gain through what could be described as a fraudulent scheme with related mailings or use

of the wires.[12] Indeed, if, as the court of appeals held, reliance by a third party and not the plaintiff suffices, it would be easier for a plaintiff to recover under civil RICO than under the common law of fraud. Coupling the removal of the requirement of detrimental reliance by the plaintiff with the prospect of recovering treble damages and attorneys' fees would provide a powerful incentive for plaintiffs to transform ordinary commercial disputes into federal RICO lawsuits. This Court should presume that Congress did not intend such a result. *Cf. Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."); *cf. also Cleveland*, 531 U.S. at 24-25 (stating, in a mail fraud prosecution in which the misrepresentations involved were illegal under state law, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes") (internal quotation marks omitted). Reversal of the Second Circuit's decision in this case would maintain the federal-state balance and contain fraud-based civil RICO claims within the common-law bounds intended by Congress.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court, dismissing the complaint.

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[12] *See* Hon. David B. Sentelle, *Civil RICO: The Judges' Perspective and Some Notes on Practice for North Carolina Lawyers*, 12 Campbell L. Rev. 145, 157 (1990) ("Not only do civil RICO plaintiffs obtain the leverage of a treble damages and attorney fees recovery, but they confront usually legitimate business with the prospect that the day after the filing of complaint a local newspaper will headline 'ABC Corporation and its President Charged with Racketeering in Federal Court.' ").

Respectfully submitted,

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18 U.S.C. § 1961 provides:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in

application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons) , sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement

from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the

law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962 provides:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1963 provides:

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the

court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper.

Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury

any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after

the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a

hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1964 provides:

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the

United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1965 provides:

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. § 1966 provides:

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

18 U.S.C. § 1967 provides:

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

18 U.S.C. § 1968 provides:

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by

a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in

writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

18 U.S.C. § 1341 provides:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(6)

No. 04-433

In The
Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA,
and NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT

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RULE 29.6 STATEMENT

Respondent, Ideal Steel Supply Corporation, is a privately owned entity. It has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Introduction

Respondent Ideal Steel Supply ("Ideal") sues Petitioners, National Steel Supply ("National") and its owners, Joseph Anza and Vincent Anza ("Anzas"), alleging violations of § 1962(a) and (c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and breach of contract. JA 5-10. Under a "cash, no tax" scheme, National and the Anzas intentionally failed to collect and remit New York State sales taxes on cash sales and filed fraudulent sales tax returns with the intent and effect of causing Ideal, National's principal competitor, to lose business, because National is able to charge less than Ideal on cash sales. JA 6-7, 8-9, 10, 11-12, 13, 15-16. This scheme also breaches a settlement agreement the parties executed to resolve a 1997 litigation, wherein National and Ideal agreed not to interfere with each other's "business activities 'other than through legitimate and proper competition.'" JA 7, 18-19; *see also* JA 25 n.3.

The district court dismissed the Amended Complaint because Ideal did not allege that it "relied on the [fraudulent] sales tax returns [the Anzas and National] mailed or wired to the New York State Department of Taxation and Finance." JA 28. The court declined supplemental jurisdiction over Ideal's breach of contract claim and entered judgment in favor of the Anzas and National. JA 2, 30. The Second Circuit reversed and vacated the judgment dismissing Ideal's RICO and breach of contract claims. JA 57. The court below analyzed (a) Ideal's factual allegations, JA 33-36; (b) RICO's statutory language, JA 38-40; (c) *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and Second Circuit decisions applying RICO's proximate causation requirement, JA 40-46; (d) *Sedima, S.P.R.L. v.*

Imrex Co., 473 U.S. 479 (1985), which recognized Ideal's standing to sue; and (e) other cases upholding the right of competitors to sue, even if defendants' misrepresentations were relied on by a third party rather than by the plaintiff. JA 46-53. The Second Circuit applied applicable pleading, standing and proximate causation precedents to the allegations, concluding that "Ideal, as a competitor directly targeted by [the Anzas and National] for competitive injury, has standing to assert its RICO claims . . . for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud." JA 54.

The Second Circuit rejected Petitioners' hypothetical assertion that supposed "problems of proof inherent in Ideal's theory of causation are intractable." JA 55. "The evidentiary difficulty hypothesized by [the Anzas and National] . . . **is not a proper basis for dismissal pursuant to Rule 12(b)(6) for failure to state a claim**." *Id.* (emphasis added; citations omitted). The proper focus is the sufficiency of Ideal's allegations, not Petitioners' hypothetical defenses. This point is critical because Petitioners offer an incomplete statement of the facts alleged by Ideal, Pet. Br. at 5-6, and ignore the applicable standard of review. So, too, does their *amicus curiae*. Brief of Chamber of Commerce of U.S. at 2-3, 22-23 & n.9. Ideal's claims "must be sustained if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'" *National Organization for Women v. Scheidler*, 510 U.S. 249, 256 (1994) (citation omitted). This Court must take Ideal's factual allegations as true and construe them in the light most favorable to Ideal. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

B. Respondent's Factual Allegations

1. Ideal And National Are Head-To-Head Competitors

Ideal and National are the only vendors in the Bronx and Queens offering a comprehensive mix of steel mill products and related hardware, supplies and services to ornamental ironworkers and small steel fabricators.[1] Products and services offered by Ideal and by National are virtually the same and they offer them in a "lumberyard" setting, conducting much of their business on a "cash and carry" basis with no minimum order required, providing convenient, one-stop shopping for the professional ironworkers, small steel fabricators and "do-it-yourself" homeowners. JA 8-9. Ideal and National purchase the steel and other products they sell from manufacturers outside New York State and sell those products for use in the New York, New Jersey and Connecticut area. JA 9.

Ideal and National have each been vendors of steel mill products and related supplies and services at their respective locations in Queens for more than ten years. National is located less than a four-minute drive from Ideal's Queens location. Since November 1996, Ideal has also maintained a location in the Bronx. In the Summer of 2000, National opened a Bronx location just eight minutes by automobile from Ideal's location. There are no other vendors in Queens or the Bronx that carry the same or

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[1] Petitioners pretend this case is nothing more than a family "feud." Pet. Br. at 1, 7. While Respondent disputes the accuracy or relevance of that characterization, it is true that Ideal is owned by Giacomo ("Jack") Brancato, Petitioner Joseph Anza is Mr. Brancato's uncle by marriage, and Petitioner Vincent Anza is Mr. Brancato's cousin. *Ideal Steel Supply Corp. v. Anza*, Case No. 02 Civ. 1788 (RMB), Plaintiff's Response to Defendants' Rule 56.1 Statement, at 2 (S.D.N.Y. Oct. 24, 2005), Docket No. 84.

similar comprehensive array of products and services serving the same customers. JA 9-10.

Ideal and National compete on the basis of **price**. Their products are commodities that are not sold on the basis of brand or manufacturer. From their customers' perspective, the only significant difference in goods and services purchased from Ideal or National is the **total price** the customer has to pay. While differences in prices charged by Ideal and National affect customers' decisions to purchase from one or the other, the overall demand for the products is not significantly affected by changes in prices. Total demand in the market depends upon economic activity in the real estate and construction businesses and demand for ornamental security or other ironworks products. Neither Ideal nor National can substantially increase overall demand for their products and services by reducing prices or through marketing efforts. Increases in sales by Ideal or by National that do not result from changes in overall market demand come at the expense of the other's sales. JA 10.

2. Requirements Of New York State Tax Law

Under New York State Tax Law (the "Tax Law"), sales to end users by Ideal and National are subject to state and local sales tax – at the relevant time 8.25% of the selling price (now 8.375%) – except that sales to purchasers with valid resale certificates are exempt. All sales are presumed taxable unless a valid resale or exempt certificate is furnished by the purchaser within 90 days of purchase. JA 9-11. National and Ideal are obligated to advise each customer of the amount of tax due on a sale and to charge, collect and pay to New York State the applicable sales tax on all taxable sales. Every sales slip, invoice, or receipt

given to a customer must separately state the amount of sales tax charged on that particular sale, and National and Ideal must report, on a monthly or quarterly basis, the amount of sales receipts for taxable sales and the amount of state and local sales tax due thereon. Ideal and National are obligated to pay the State the requisite sales tax collected for the previous reporting period when they file their returns. JA 11.[2]

3. The Anzas' Racketeering Scheme

As National's sole owners, the Anzas direct and control activities in connection with its state-mandated obligations of charging and collecting sales tax, making sales tax payments to the State and filing sales tax returns. In willful violation of the Tax Law, the Anzas operated a "cash, no tax" scheme. When National's customers pay in cash, its employees do not charge or collect the required sales tax. National provides to the customer a receipt on which only a single price per item is given and no sales tax is indicated. National does not report or pay to

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[2] *See* N Y TAX LAW §§ 1101, 1105 and 1131-1137; 101 N.Y. JUR 2D, *Taxation and Assessment* § 1791 (2005) (vendors required to collect sales tax from customer when collecting price), § 1800 (presumption that all sales are subject to sales tax until contrary is established), § 1803 (sales tax must be shown and charged separately on any sales slip, invoice, receipt, or statement given to customer by person required to collect tax), § 1804 ("A person required to collect the sales and use tax is prohibited from advertising or holding out to the purchaser or the public in any manner, directly or indirectly, that the tax is not considered an element of the price. . . Nor may he indicate that the customer is not being charged the tax, or that the tax will be refunded to the customer or applied as a credit to the customer's bill, account, of future purchases.") (citations omitted).

the State sales tax on those taxable sales for which National did not charge tax to its customers. JA 11-12.

The Anzas furthered their "cash, no tax" scheme by filing on behalf of National, on a monthly or quarterly basis for each reporting period starting in 1998 (if not earlier), state sales tax returns they knew to be false. National's returns misrepresented the total amount of taxable sales and the amount of sales tax collected for the quarter (or month). JA 12. Based on fraudulent misrepresentations (and omissions) in the sales tax returns, upon which the Department of Taxation relied, National avoided paying sales tax on a significant portion of its taxable sales. The false returns, and the State's reliance thereon, were essential for the Anzas and National to avoid paying sales tax and continue their racketeering scheme over an extended period of time. JA 12-13.

4. Petitioners' Illegitimate Competitive Advantage And Injuries To Ideal's Business Or Property

The purpose and direct effect of the "cash, no tax" scheme is to create an illegitimate competitive advantage for National. By failing to charge and collect sales tax and failing to remit sales tax to the State, which can only be accomplished by filing false returns, National is able to reduce the total amount its cash customers pay by at least 8.25% without reducing its own profit margin. Ideal's prices are the same or lower on average than National's prices; however, because National does not charge sales tax on taxable sales, the overall cost to customers is typically lower than at Ideal for the same goods and services. But for the "cash, no tax" scheme, National would

not have a competitively significant price advantage over Ideal. JA 13, 15.

The racketeering scheme has had a significant and intended deleterious effect on Ideal's business. For example, Ideal experienced a steep drop in taxable cash sales after National opened its Bronx facility that was disproportionate to the effect that National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate. Legitimate business competition cannot explain the disproportionate decline in Ideal's taxable cash sales in comparison with Ideal's other sales for which National cannot offer unlawful savings under the "cash, no tax" scheme. JA 13-14.

The "cash, no tax" scheme directly injures Ideal because the unlawful tax saving is intended to and does attract customers to make purchases from National which would otherwise have been made from Ideal. The scheme directly injures Ideal because it is aimed at increasing National's market share and overall profits at the expense of its principal competitor. Petitioners profit from their racketeering scheme only by gaining business at Ideal's expense. JA 16. As a direct result of the racketeering scheme and National's false tax returns, Ideal lost a substantial volume of its taxable cash business and lost profits exceeding $5 million. JA 16-17, 19-20. Ideal alleged facts sufficient to show that the injury to "business or property" was proximately caused by Petitioners' operation of National's stores through a "pattern of racketeering activity." JA 33-36, 53-54.[3]

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[3] Ideal's allegations are far more detailed than those found deficient in *Dura Pharmaceuticals, Inc. v. Broudo*, ___ U.S ___, 125

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C. Ideal's RICO Claims

Ideal's First Cause of Action alleges that the Anzas violated § 1962(c), and the Second Cause of Action alleges that the Anzas and National violated § 1962(a). JA 14-18. The Second Circuit held that each element of Ideal's RICO claims was properly stated. JA 38-40, 54-55. For purposes of Ideal's § 1962(c) claim, the Anzas are the liable "person[s]" and, for the § 1962(a) claim, National is also a "person." For purposes of the § 1962(c) claim, National is the "enterprise" and the Anzas "direct[] and control" National's affairs, thereby satisfying the "operation or management" test, *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993), and the distinction between liable "person[s]" and "enterprise." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). Ideal's § 1962(a) claim alleges that the "enterprise" is National's Bronx location, which was opened by the Anzas in Summer 2000 with the racketeering income derived from their "cash, no tax" scheme. The "pattern of racketeering activity" – mail fraud and wire fraud – is the filing of National's false sales tax returns on a quarterly or monthly basis. JA 15-16, 39-40.[4]

S Ct. 1627, 1630, 1632, 1634 (2005). Petitioners have never complained that Ideal did not "provide . . . some indication of the loss and the causal connection that [Ideal] has in mind." *Id.* at 1634.

[4] "The mailing of false state sales tax returns may constitute mail fraud in violation of § 1341." JA 39 (citing *United States v. Porcelli*, 865 F.2d 1352, 1360-61 (2nd Cir.), *cert. denied*, 493 U.S. 810 (1989), and *United States v. Slevin*, 106 F.3d 1086, 1088 (2nd Cir. 1996) ("Because the [mail and wire fraud] statutes use the same relevant language, they are analyzed in the same way")).

D. Subsequent Proceedings In The District Court

Following the Second Circuit's decision, Petitioners filed an Answer to Ideal's Amended Complaint. Fact discovery included the exchange of documents and the depositions of Ideal's management, the Anzas and others. According to Vincent Anza (National's owner and president), National did not charge or collect sales tax from any of its "cash customers" from its inception until the beginning of 2004. These "cash customers" included both "pick-up" and "delivery" sales, but if the same purchases were made from National with a check or on credit, New York State sales tax was added.[5] While the Anzas invoked the Fifth Amendment rather than answer questions about their income tax returns, they admitted skimming cash generated by sales that had not been reported on National's tax returns. During discovery, Petitioners amended their tax returns for 1998-2003 to increase by millions of dollars the reported income and "correct" other misstatements in the original returns, thereby confirming their income tax avoidance scheme.[6]

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[5] Vincent Anza testified that National started charging tax to its customers in the "beginning" of 2004. Joseph Anza testified that in Spring 2004, National started to separately report New York State tax on cash transactions. Depo. of V. Anza, at 93-94 (Jan. 11, 2005), Depo. of J. Anza, at 170-71 (Feb. 8, 2005).

[6] Depo. of V. Anza, at 467-76, Depo. of J. Ofsink, at 14-16, 40, 42 (excerpts attached as Exs. 1 and 2 to Plaintiff's Response to Defendants' Rule 56.1 Statement, *Ideal Steel Supply Corp. v. Anza*, Case No. 02 Civ. 4788 (RMB) (S.D.N.Y. Oct. 24, 2005), Docket No. 84. Ideal's forensic accountant demonstrated that Petitioners' amended tax returns are still false and misleading and significantly understate National's actual cash sales by millions of dollars. Report of Weiser LLP, at 36-41 (Mar. 11, 2005).

On December 30, 2004, Ideal filed its Second Amended Complaint ("SAC"). The Fourth and Fifth Causes of Action assert violations of § 1962(a) and (c), alleging that the Anzas and National engaged in an "income tax free sales" scheme to gain further competitive advantage over Ideal "by [knowingly] filing false income tax returns and defrauding the [IRS] and the New York State Department of Taxation of Finance," with each filing constituting a RICO predicate act. SAC ¶¶ 50-51, 90, 92. Since 1998, National "significantly understate[d] its income on its federal and state income tax returns by, *inter alia*, using the false sales tax figures taken from National's sales tax returns and understating its gross profit margins on its underreported sales by improperly manipulating the other components of the gross profit calculation. . . . " SAC ¶¶ 7, 48. The Anzas and National "pass on to National's customers the income tax 'savings' that [the Anzas and National] realize as a result of their false returns, thereby increasing National's sales and customer base through lower pricing without decreasing its profit margin," and causing injury to Ideal's business. SAC ¶¶ 56-57, 95. The Second Amended Complaint was deemed filed as of April 20, 2005. *Ideal Steel Supply Corp. v. Anza*, 2005 WL 911470, *1 (S.D.N.Y. Apr. 19, 2005). This case is now ready for trial as to Ideal's RICO and breach of contract claims.

SUMMARY OF ARGUMENT

For the sixteenth time in a generation, this Court is called upon to construe RICO's civil remedy provision.[7]

[7] Reference to this Court's previous civil RICO decisions demonstrates the statute's intended breadth and correct methods of interpreting its

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Petitioners inappropriately ask this Court to restrict § 1964(c), which grants Ideal standing to sue: "**Any person injured in his business** or property **by reason of** a violation of [§] 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . ." 18 U.S.C. § 1964(c).[8]

By ignoring the first clause and focusing exclusively on the second clause, which imposes a "proximate cause" requirement, the Anzas and National miss the point of this case. Pet. Br. at 10-11. Ideal and National are **direct competitors** and Ideal was the "target" and "victim" of the Anzas' scheme and pattern of racketeering activity. JA 33-34, 46-54. Who else but a head-to-head **competitor** that lost sales and profits due to the "cash, no tax" scheme has been injured in its **business** and, therefore, has standing to sue? JA 54 ("[W]e conclude that Ideal, as a

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provisions. *See, e.g., Scheidler v. National Org. for Women, Inc.*, No. 04-1244 (anti-abortion protests); *Pacificare Health Sys. v. Book*, 538 U.S. 401 (2003) (managed care); *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (boxing); *Beck v. Prupis*, 529 U.S. 494 (2000) (employment termination); *Rotella v. Wood*, 528 U.S. 549 (2000) (wrongful imprisonment); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (products liability); *National Org. for Women v. Scheidler*, 510 U.S. 249 (1994) ("*NOW I*"); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (securities fraud); *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258 (1992) (securities fraud); *Tafflin v. Levitt*, 493 U.S. 455 (1990) (securities fraud); *H.J., Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229 (1989) (bribery); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (anti-competitive behavior); *American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606 (1985) (prime rate fraud); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (breach of contract).

[8] Here, as elsewhere in Respondent's Brief, emphasis is added unless otherwise indicated.

competitor directly targeted by [the Anzas] for competitive injury, has standing to assert its RICO claims").

In addition to ignoring the statutory language, Petitioners avoid RICO's express purpose and legislative history, which also support Ideal's standing to sue. On at least three occasions, *see Sedima*, 473 U.S. at 497 & n.15; *Holmes*, 503 U.S. at 273 n.19; and *NOW I*, 510 U.S. at 255-56, this Court has recognized Ideal's standing. Petitioners also ignore circuit court decisions recognizing the standing of **competitors** to bring RICO claims where "racketeering activity" consists of mail and wire fraud directed from defendants to third parties, including customers and government agencies. Petitioners also ignore commentators' analysis of RICO standing (injury plus causation) that is consistent with the decision of the court below and arguments advanced here by Ideal.[9]

Ideal was the intended target and victim of Petitioners' racketeering scheme. Injuries to its "business or property" are not indirect or derivative, and they do not flow from injuries inflicted upon third parties. While others (such as the State of New York) may have also been "directly" injured by Petitioners' false tax filings, there is

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[9] *See, e.g.*, Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. §1962(c)*, 39 U.S.F. L. REV. 319 (2005); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 WASH. & LEE L. REV. 83 (2002); Ryan C. Morris, *Proximate Cause and Civil RICO Standing*, 2004 BYU L. REV. 739, 739 n.2 (2004) (citing earlier articles); Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455 (1996); and G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young. Its Meaning and Impact on Substantive, Accessory, Aiding & Abetting and Conspiracy Liability Under RICO*, 33 AMER. CRIM. L. REV. 1345 (1996) ("Blakey & Roddy, *Reflections*").

no suggestion in § 1964(c) or *Holmes* that there can be only one "directly" injured party. Unlike *Holmes*, where the injury to the target(s) of the racketeering scheme was not the cause of the injury that SIPC sustained, thereby making SIPC's claim indirect or derivative, here the injury to Ideal (lost profits) was directly caused by the price advantage that Petitioners' RICO violations unlawfully created.[10] Ideal's lost sales and profits were not caused by or derived from New York State's diminished sales tax collections. Ideal does not seek to collect taxes owed by National to the State; indeed, the injury to Ideal's business or property is independent of the State's financial losses.

Ideal's "reliance" allegations are well within the requirements of § 1964(c) and the common law. Ideal does not allege that it relied on Petitioners' false fax filings; rather, the State of New York relied and its reliance was an essential and necessary element for the racketeering scheme to succeed. In order to offer cash customers (a majority of National's business) the overall lower prices that not charging or collecting sales tax allowed, and benefit from the increased business taken from the customer such illegal pricing generated, Petitioners had to

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[10] The competitive advantage gained by National through the "cash, no tax" scheme was recognized in *Porcelli*, 865 F.2d at 1359-62, which affirmed the RICO and mail fraud conviction of a gas station operator who filed "some one hundred" fraudulent New York State sales tax returns with respect to sales at 12 gasoline stations he operated. Rejecting the argument that the mail fraud statute does not apply to tax violations, the Second Circuit found that Porcelli "intended to deprive New York of its property"; namely, the unpaid sales taxes. *Id* at 1359-62. "Porcelli, as he knew he was doing, obtained cash, and this is true whether or not he actually collected the sales tax on his gasoline sales **If he did not collect the tax, then he obtained funds that an honest retailer, selling for the same price, would have remitted to the state.**" *Id* at 1360 (emphasis added).

understate their sales and corresponding sales tax obligations. The State of New York's reliance on those monthly or quarterly filings, so as not to question Petitioners or require them to prove their accuracy, was necessary to allow the racketeering scheme to proceed, thereby causing injury to Ideal's business, unimpeded by regulatory interference, for years and years.

In their depositions, the Anzas admitted that National **never** charged sales tax to cash-paying customers – and always understated its sales and sales tax obligations in tax filings until April 2004. In that month (two years after this case began), the Department of Taxation commenced a sales tax audit of National's business. Ideal's taxable cash sales, which had plummeted when the Anzas opened a competitive facility near Ideal's Bronx location in 2000, improved dramatically once National ended its "cash, no tax" practices. Whether those two events were mere coincidence (as Petitioners claim), or evidence the racketeering scheme and the role of the State of New York's reliance upon the false tax filings made as a necessary part of that scheme, is for a jury to decide.

Petitioners seek to reduce Ideal's RICO claims to nothing more than a "garden variety" business dispute and common law fraud claim.[11] While elements of a RICO claim may be partly infused with common law learning, the two claims – RICO and common law fraud – are not identical. But even if common law governs this case (and it does not), Petitioners' crabbed view of reliance is wrong.

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[11] One fervently hopes, for the sake of our society and the rule of law, that Petitioners' multiyear "cash, no tax" scheme, which allegedly deprived the State of New York of millions of dollars in tax revenue, and cost Ideal millions of dollars in lost sales and profits, does not represent "common" and "routine" business behavior. Pet. Br. at 2, 12.

Since at least 1876, third-party reliance (such as New York State's reliance upon the false tax filings) has been sufficient for common law fraud where the third party's action (or inaction) in reliance on the misrepresentations is essential for the scheme to succeed.

Nothing in RICO militates against allowing third-party reliance in this case. Schemes to defraud come in all shapes and sizes, limited only by the imagination of the malevolent, and the mail and wire fraud statutes are broad enough to encompass all such schemes. Section 1964(c)'s requirement of alleging injury to Ideal "business" or property "by reason of" Petitioners' racketeering scheme is inclusive. Nothing in the statute, or this Court's construction of RICO injury and proximate causation in *Sedima, Holmes,* or *NOW I*, precludes allegations of third-party reliance if a scheme to defraud directly causing injury necessarily includes persuading a third party to act or not to act in a particular way to allow wrongdoers to achieve their intended and illegal goals.

ARGUMENT

A. The Second Circuit's Decision Is Consistent With RICO's Statutory Language, Express Purpose And Legislative History

To remain faithful to this Court's precedents (*see* note 7, *supra*), any reasoned analysis must consider RICO's language, legislative history, and public policy. To establish standing to sue, § 1964(c) requires Ideal to allege two elements: That it suffered injury to "business or property" and that its injury was caused by predicate acts of racketeering activity that make up the violation of § 1962. *Sedima*, 473 U.S. at 496-97; *Mid Atlantic Telecom, Inc. v. Long Distance*

Servs., Inc., 18 F.3d 260, 263 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994). By providing a cause of action to "**any** person injured" by reason of the law's violation, RICO avoids undue limitations on the plaintiffs eligible to sue.

Ironically for this case, which involves head-to-head competitors, one of the earliest injury limitations that lower courts sought to impose on § 1964(c) was "competitive injury."[12] Although the Second Circuit rejected the "competitive injury" requirement, it adopted an equally amorphous "racketeering injury" requirement. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496 (2nd Cir. 1984). This Court reversed, stating that "we perceive no distinct 'racketeering injury' requirement. . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)." *Sedima*, 473 U.S. at 496. "**[T]he statute requires no more than this.**" *Id.* at 497 (emphasis added). *Sedima* foreclosed attempts to limit RICO's scope by granting standing only to plaintiffs alleging a "competitive injury" or a "racketeering injury" distinct from harm caused by predicate acts. *Id.*; *see also Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 387-99 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

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[12] "Competitive injury" referred to injury derived from the impact on the marketplace of the RICO violation. The case for "competitive injury" was founded on RICO's antitrust origins. Congress's concern, it was argued, was that the commercial marketplace "was being harmed because legitimate businesses were forced to compete with racketeer-dominated businesses that could operate more efficiently because they made use of unlawful practices." This being the case, "it followed that the scope of RICO's private action should be limited to those types of situations." 2 Arthur F. Mathews *et al.*, CIVIL RICO LITIGATION § 8.03[A], at 8-17 (2nd ed. 1992) ("Mathews, CIVIL RICO LITIGATION").

Affording broad standing to RICO plaintiffs is "consistent with the statute's purpose. It was passed in order to address what was found to be a pervasive and serious problem in our society, namely, the proliferation of racketeering within the legitimate business sector." *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 568 (E.D.N.Y. 1999). Criminal penalties for violations of RICO are stiff, yet criminal prosecutions alone are inadequate to deal with racketeering. The Government is not in a position to identify all significant transgressions. Treble damages enhance the likelihood that private parties will be induced to assume the role of "private attorneys general," vindicating not only their own interests but those of society as well. *Agency Holding Corp.*, 483 U.S. at 151. As this litigation demonstrates, Ideal is best equipped to serve as "private attorney general" and effectively prosecute Petitioners' "cash, no tax" scheme.

Ideal alleges that "[a]s a direct result of [Petitioners'] racketeering scheme and National's false state tax returns," it has "lost a substantial volume of its taxable cash business which has cost and continues to cost Ideal a substantial amount of profits and market share." JA 16. "Such economic losses would constitute an injury to both [Ideal's] business and property." *Blue Cross*, 36 F. Supp. 2d at 569; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("When a commercial enterprise suffers a loss of money it suffers an injury in both its 'business' and its 'property.'"); *Mid Atlantic Telecom*, 18 F.3d at 261 (RICO standing based on alleged losses of revenue and customers). Other RICO decisions reach the same conclusion.[13]

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[13] *See Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325-30 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993) (developer lost project to competitor

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Ideal satisfies the pleading standard for RICO standing reiterated in *NOW I*, 510 U.S. at 256. The plaintiffs – DWHO and SWHO – were health care centers that perform abortions and they alleged that anti-abortion protesters conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors and patients to give up their jobs, their right to practice medicine, and their right to obtain medical services at the clinics. *Id.* at 252-53. DWHO and SWHO claimed that the conspiracy "has injured the[ir] business and/or property interests." *Id.* at 253-54. Upholding the clinics' "standing to bring their claim," *id.* at 255, this Court, per Chief Judge Rehnquist, stated that the complaint "alleges [an] 'injury' to DWHO and SWHO 'fairly traceable to the [protesters'] allegedly wrongful conduct.' **Nothing more is needed to confer standing on DWHO and SWHO at the pleading stage.**" 510 U.S. at 256 (citations omitted). *NOW I* found that the clinics properly alleged RICO standing, even though the intimidating acts were largely directed against third parties (patients, employees and physicians), thereby allowing the clinics to claim damage to their "business or property" resulting from acts directed

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because of bribes paid to local officials); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3rd Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990) (competitor bribed Nigerian government during bid process); *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F. Supp. 528, 540-43 (D. Md. 1996) (automobile dealers deprived of profits when bribe-paying dealers unjustly received extra allotments of vehicles); *Mylan Labs., Inc. v. Akso, N.V.*, 770 F Supp. 1053, 1084 (D Md. 1991), *aff'd sub nom., Mylan Labs., Inc. v Matkari*, 7 F 3d 1130 (4th Cir. 1993) (alleged losses of revenue and customers). In "two-competitor cases," "**misappropriation by one party [National] can be reasonably equated to injury to the other [Ideal].**" *American Honda*, 941 F Supp at 542 (emphasis added). Ideal alleges that the relevant market is a zero-sum game *Compare* JA 8-14 *with* Pet Br at 17-18

at others. The decision in *NOW I* should control here. *See Mendoza v. Zirkle Apple Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002); *American Honda*, 941 F. Supp. at 542-43.

Section 1964(c), as construed in *Sedima* and *NOW I*, makes clear Ideal's standing to sue, and this conclusion is reinforced when we consider RICO's legislative history and public policy. RICO was enacted as Title IX of the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. 91-452, 84 Stat. 941 (1970), because 18th and 19th Century jurisprudence was ineffective to combat white-collar crime.[14] Its Statement of Findings emphasized that "organized crime . . . is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption," that such activities "weaken the stability of the Nation's economic system, **harm innocent investors and competing organizations, interfere with free competition**, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens," and that organized crime "continues to grow" because "the sanctions and remedies available to the Government are necessarily limited in scope and impact." It was RICO's declared purpose "to seek the eradication of organized crime" by "providing **enhanced sanctions and new remedies** to deal with" its unlawful activities. 84 Stat. at 922-23

[14] OCCA was based upon recommendations of the President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), which observed that "organized crime is . . . extensively and deeply involved in legitimate business. . . . Here it employs illegitimate methods – . . . [including] **tax evasion** . . . to exact illegal profits from the public." *Id.* at 187.

(emphasis added).[15] Treble damages protect "**the honest businessman who has been damaged by unfair competition from the racketeer businessman.**" 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska).[16] *See NOW I*, 510 U.S. at 260 (protesters' acts of extortion "may drain money from the economy by harming businesses such as the clinics," which lost patients).

Just as RICO's legislative history forewarned, Petitioners' racketeering scheme has "drained [m]illions from the American economy." 84 Stat. at 922. Ideal's Amended Complaint describes the far-reaching, economic dislocation that RICO was intended to combat, and Ideal represents

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[15] RICO "was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). Although its major purpose was "to address the infiltration of legitimate business by organized crime," RICO was not limited to the prohibition of infiltration of legitimate organizations. *United States v. Turkette*, 452 U.S. 576, 590, 591 (1981). Nor does it apply only to "organized crime" in the classic "mobster" sense. *Sedima*, 473 U.S. at 495. With its purposefully broad definition of "racketeering activity," RICO acknowledges the "breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate wholly within legitimate enterprises." *H.J.*, 492 U.S. at 248. The statute is "broad[] enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *Id.* at 248-49.

[16] Referring to the Criminal Activities Profits Act, which contained the legislative antecedent to § 1964(c), Senator Hruska stated that the bill "**creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman.**" 115 Cong. Rec. 6993 (1969). Economists recognize that absent a treble damages remedy, fraud victims often cannot recover their **actual** losses. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 158-72 (1993) (after appropriate adjustment factors such as attorneys fees and lack of prejudgment interest, treble damages awarded are probably only equal to actual damages in antitrust cases).

the kind of business Congress intended to protect from racketeering and "white-collar" crime. RICO's legislative history, "not only refers frequently to the importance of undermining organized crime's influence upon legitimate businesses but also refers to the need to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner*, 533 U.S. at 165 (quoting S. Rep. No. 91-617, at 82).

Any doubts concerning application of the statute should be resolved in favor of vigorous enforcement of RICO's remedies. Section 904(a) of OCCA provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." 84 Stat. at 947. *Sedima* rejected attempts to narrow the reach of § 1964(c) because "RICO is to be read broadly. . . . This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition. . . ." 473 U.S. at 497-98 (citation omitted).

B. The Second Circuit's Decision Is Consistent With *Holmes*

1. The Decision In *Holmes*

Section 1964(c)'s "by reason of" clause limits standing to plaintiffs alleging that the violation was the legal (proximate) cause of their injury, as well as a logical ("but for") cause. *Holmes*, 503 U.S. at 268. The requirement that defendant's actions be a proximate cause of plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. In marking that boundary, this Court states that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing

legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient." *Holmes*, 503 U.S. at 268 (internal quotation marks omitted) (quoting W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984) ("Keeton, LAW OF TORTS").

Petitioners contend that the chain of causation between their refusal to collect and pay New York State sales taxes and Ideal's loss of customers, sales and profits is too long and tenuous to meet RICO's proximate cause test. Pet. Br. at 15-18. But *Holmes* entirely supports Ideal's right to sue Petitioners for injuries to its business or property. The defendants in *Holmes* were alleged to have participated in a conspiracy to manipulate the value of the stock of several companies. 503 U.S. at 262. Two broker-dealers who dealt in large amounts of the manipulated stock were put into liquidation when they experienced financial difficulties after the fraud was disclosed and the value of the manipulated stock precipitously declined. Alleging that defendants' securities fraud and mail and wire fraud offenses amounted to a pattern of racketeering activity, SIPC brought suit on behalf of certain of the injured broker-dealer firms' customers who became unsecured creditors when the firms became insolvent. *Id.* at 270.

Justice Souter's majority opinion applied a proximate cause test requiring a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. The "direct relation" requirement generally precludes recovery by a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* This Court found that the link between the customers' losses that SIPC sought to recover and defendants' stock manipulation was too remote to

satisfy this "direct relation" test. "The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the . . . customers." *Id.* at 271. This Court noted in contrast that the liquidating trustees suing directly on behalf of the defunct broker-dealers would have been the proper plaintiffs. *Id.* at 273. The same thing is true in this case: Ideal is the proper plaintiff to sue Petitioners, and *Holmes* would only defeat its RICO claims if the plaintiff was one of Ideal's **creditors** (banks, vendors, employees, etc.) that Ideal could not pay because it had been economically injured by Petitioners' racketeering scheme.

Holmes stressed the difficulty of achieving precision in fashioning a test for determining whether a plaintiff's injury was sufficiently "direct" to permit standing under RICO. *Id.* at 272 n.20 ("[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."). This Court warned against applying a mechanical test detached from policy considerations associated with the proximate cause analysis. Accordingly, the federal courts, and the Second Circuit in particular, have turned to those policy considerations to guide application of the "direct relation" test. *See, e.g., Commercial Cleaning Svcs., L.L.C. v. Colin Svc. Sys., Inc.*, 271 F.3d 374, 380-85 (2nd Cir. 2001).

2. Evaluation Of Ideal's Claims Against Petitioners In Relation To This Court's Proximate Causation Test

Ideal alleges a "direct" proximate relationship between the injury to its "business or property" and Petitioners' pattern of racketeering activity. JA 40-54. *Holmes* gave three policy reasons for limiting RICO's civil damages

action only to those plaintiffs who could allege a "direct" injury. **First**, the less "direct" an injury is, the more difficult it becomes to determine what portion of the damages are attributable to the RICO violation as distinct from other, independent factors. *Holmes*, 503 U.S. at 269, 273. **Second**, if recovery by indirectly injured plaintiffs were not barred, the courts would be forced, in order to prevent multiple recovery, to develop complicated rules apportioning damages among groups of plaintiffs depending on how far each group was removed from the defendant's underlying RICO violation. *Id.* **Third**, there was no need to permit indirectly injured plaintiffs to sue because directly injured victims could be counted on to vindicate RICO's aims, and their recovery would fix the injury to those harmed as the result of the injury they suffered. *Id.* at 269-70, 273-74; *see also Commercial Cleaning*, 271 F.2d at 381-85.

a. The Simplicity Of Determining Damages Attributable To Petitioners' RICO Violations

Petitioners argue that a factfinder would be required to determine whether Ideal's lost business to National was the result of the "cash, no tax" scheme as opposed to independent business reasons, such as the comparative quality of the companies' services and business reputations, fluctuations in demand, or other reasons customers might have for selecting one company over another. Pet. Br. at 15-17. The difficulty of proof identified in *Holmes* 503 U.S. at 269, 273, however, was quite different from this case. Ideal and National are head-to-head competitors. JA 6, 8-9, 33-34. Ideal lost customers, business and profits exceeding $5 million because National was able to

underbid Ideal due to its "cash, no tax" scheme, which permitted it to charge lower prices for its products in a market in which Ideal and National compete against one another "primarily on the basis of price." JA 10-14, 34-36. Ideal was no less directly injured than the insolvent broker-dealers in *Holmes*, whose trustees would be proper plaintiffs. *See Holmes*, 503 U.S. at 273-274.[17] If Ideal can prove its claims at trial (and discovery conducted during 2004-2005 and reports submitted by its experts show it can), a jury can find that Ideal lost sales and profits directly because of the price advantage Petitioners realized through their "cash, no tax" scheme.[18]

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[17] Petitioners speculate that a "potential causal explanation for Ideal's lost profits could be 'poor business practices,'" Pet. Br. at 18 (quoting *Holmes*, 503 U.S. at 273), or other business reasons, *id.* at 10-11, 16-18, but there are no such allegations in Ideal's Amended Complaint. As was made clear in *Zirkle*, 301 F.3d at 1171, relying on *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), an antitrust price-fixing case brought by milk producers against cheese producers who allegedly fixed the price of cheese which, in turn, set the price of milk artificially low, when addressing causation issues on a motion to dismiss, courts must necessarily reject defendants' speculative claim that the anti-competitive effect of their scheme was due to "independent factors" because "in deciding a Rule 12(b)(6) motion we are dealing only with the complaint's allegations." *Zirkle*, 301 F.3d at 1171 (quoting *Knevelbaard*, 232 F.3d at 991).

[18] A "proximate" cause is not the same thing as a "sole" cause, a factor is a proximate cause if it is "a substantial factor in the sequence of responsible causation." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (citation omitted). Thus, Ideal "need[s] not prove" at trial that Petitioners' "cash, no tax" scheme and the false and misleading sales tax returns (mail and wire fraud) were the "sole" cause of injuries to its business or property, *id.*, rather, Ideal must only show that Petitioners' predicate acts were a "substantial factor" in perpetuating their racketeering scheme and causing Ideal's injury. *Maiz v. Virani*, 253 F.3d 641, 675 (11th Cir. 2001); *compare* Keeton, LAW OF TORTS, § 41 at 268 ("If a defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability

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b. There Is No Need To Apportion Damages Among Injured Parties

Holmes stated that if courts do not limit recovery to injuries directly related to the RICO violation, they will be forced to devise complicated rules "apportioning" damages among plaintiffs at different degrees of separation from the violative acts alleged. 503 U.S. at 269, 273. Petitioners contend Ideal is not the only aggrieved party that could recover damages. Pet. Br. at 18-19 & nn.3-4 (identifying other potential plaintiffs as New York State and "Ideal's suppliers"). But this misses the point made in *Holmes*: If damages are paid **both** to first-tier plaintiffs (those directly injured by defendant's alleged acts) **and** to second-tier plaintiffs (those injured by the injury to the first-tier plaintiffs), then the payment of damages to first-tier plaintiffs cures the harm to second-tier plaintiffs, and payment of damages to the latter involves double compensation. *Holmes*, 503 U.S. at 269, 273. If defendant's illegal acts causes "direct" injury to more than one category of plaintiffs, defendant may well be obligated to compensate different plaintiffs for different injuries, and it does not follow that any plaintiff will have been twice benefited. *Compare Commercial Cleaning*, 271 F.3d at 383-84 *with* Pet. Br. at 19-20.

Ideal does **not** seek to recover damages (unpaid sales taxes) that belong to the State of New York. Assume a $100 cash sale of 25 ½-inch square steel bars (a common commodity) to a small contractor in the Bronx. The honest retailer, Ideal, charges the customer $108.25 ($100 + $8.25 sales tax). The dishonest retailer, National, neither

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merely because other causes have contributed to the result, since such causes, innumerable, are always present") *with* Pet. Br at 17-18.

charges nor collects the 8.25% state sales tax and may even charge the customer up to $107, thereby undercutting Ideal's price, increasing its profit margin by several extra dollars, and depriving the State of New York of sales tax that was owed. New York State's injury is 8.25% of the sales price, the tax that National failed to collect and remit to the State, plus interest and penalties. Ideal, which lost the $100 sale, suffers a **different** injury, namely, its lost sale and the gross profits thereon. Assuming a 20% gross profit margin (as demonstrated in discovery and by Ideal's experts), the injury to Ideal's business or property is $20 from that $100 sale. The important point, for purposes of *Holmes* causation analysis, 503 U.S. at 273, is that there is no need to "apportion" damages between Ideal and New York State. They are not at "different levels of injury" from Petitioners' racketeering scheme. The amount of damages that they, as first-tier plaintiffs, are entitled to collect from Petitioners are independent, separate and distinct and there is no "risk of multiple recoveries" of the same damages. *Id.* at 269; *Mid Atlantic*, 18 F.3d at 264 (plaintiff did not seek to vindicate claims of customers who accepted defendant's fraudulent, ostensibly lower rates but, rather, alleged "distinct and independent injuries: lost customers and lost revenues").

Petitioners hypothesize a plethora of RICO claims, asserting that "Ideal's suppliers" (or, presumably, Ideal's other creditors and even its employees) could "seek treble damages and attorneys' fees from National." Pet. Br. at 18 n.3. But these "creditors" would still be required to show that their losses were proximately caused by the racketeering scheme. The concern of *Holmes* was that a violator might be obligated to pay double compensation if required to compensate those directly injured (Ideal) and those injured by the injury to those directly injured

(hypothetically, Ideal's "creditors"). 503 U.S. at 269, 273. It was not that a violator might be obligated to compensate two or more different classes of plaintiffs – Ideal and New York State – each of which suffered a separate, concrete financial injury proximately caused by Petitioners' RICO violations. *See Commercial Cleaning*, 271 F.3d at 384.

c. The Ability Of Other Parties To Vindicate The Aims Of The Statute

In relation to the third *Holmes* policy factor, this Court observes that "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in [RICO] enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated Gen'l Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (*cited in Holmes*, 503 U.S. at 270). Petitioners argue that this factor weighs against Ideal's standing because other parties, such as New York State, may bring suit or press criminal charges. Once again, Petitioners miss the point: If the existence of a public authority that could prosecute a claim against putative RICO defendants meant that the plaintiff is too remote under *Holmes*, then no private cause of action could ever be maintained because every RICO predicate offense, as well as the RICO enterprise itself, is separately prosecutable by the government. In *Holmes*, 503 U.S. at 269-70, 271 & n.18, those directly injured could be expected to sue, and their recovery would redound to the benefit of the plaintiffs suing for indirect injury.[19]

[19] *Holmes* observed that "the broker-dealers have in fact sued in this case, in the persons of their . . . trustees appointed on account of

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Here, in contrast, suits by New York governmental authorities to "recover lost taxes" would do nothing to remediate Ideal's loss of profits. *Compare Commercial Cleaning*, 271 F.3d at 385 *with* Pet. Br. at 19-20. There are no potential plaintiffs who have been more directly injured by the RICO violations than Ideal, National's only business competitor, which has a greater incentive to ensure that a RICO violation does not go undetected or unremedied. *See Holmes*, 503 U.S. at 273-74, *Commercial Cleaning*, 271 F.3d at 385.[20]

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their insolvency." 503 U.S. at 273 (footnote omitted). No other civil actions (let alone criminal prosecutions) have been brought against Petitioners arising out of the "cash, no tax" scheme. As in *Zirkle*, 301 F.3d at 1170, "[n]either the [New York State] government nor [Ideal's creditors or suppliers] are an intervening third party" in this RICO action.

[20] Petitioners also suggest that the Second Circuit should have dismissed Ideal's § 1962(a) claim. *Compare* JA 39, 54-55 *with* Pet. Br at 20 n.5. This issue is not before this Court, but it is clear that Ideal properly alleged that Petitioners violated § 1962(a) by using ("investing") the proceeds of their unlawful "cash, no tax" scheme from sales at their Queens location to open National's Bronx location, thereby causing Ideal additional (and distinct) injuries to its business or property. JA 17-18; 54-55; *see American Honda*, 941 F. Supp. at 549-50 (honest car dealers pled "investment use" injury when they alleged that corrupt Honda executives used bribes and kickbacks they received to obtain ownership interests in new or existing dealerships). Section 1962(a) "was primarily directed at halting the investment of racketeering proceeds into legitimate businesses, **including the practice of money laundering**." *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3rd Cir. 1991) (emphasis added). That is precisely what Ideal alleges.

C. The Second Circuit's Decision Is Consistent With Post-*Holmes* Decisions

1. Reliance Is Not An Element Of Mail Or Wire Fraud, And It Is Not An Element Of Section 1962 Or Section 1964(c)

The *Holmes* Court said nothing about "reliance," even though Petitioners claim it is an element of mail, wire and securities fraud, the predicate acts in that case. 503 U.S. at 263.[21] By imposing a mechanistic "reliance" requirement in all RICO cases alleging "fraud-based" predicate acts, Petitioners raise the wrong question.[22] The question is not whether "reliance" should be required but, rather, reliance by **whom**. Even if many courts have imposed (wrongly we say) a "reliance" requirement in RICO cases where the predicate acts are mail or wire fraud, they also recognize that reliance by a third party (customers, regulators *et al.*) suffices when plaintiff alleges that it was a "competitor" of the racketeering enterprise and/or a "target" of the scheme. *Cf. Holmes*, 503 U.S. at 272 n.19. In their rejection of "third-party reliance," Petitioners ignore these precedents, even though many of them were relied on by the Court below. *Compare* Pet. Br. at 31-34 *with* JA 47-51.

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[21] In *Holmes*, 503 U.S at 274 n.20, this Court qualified its use of the term "direct," stating that "[w]e do not necessarily use it in the same sense as courts before us have and intimate no opinion on results they reached." This Court refused to follow *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), which held that a RICO plaintiff alleging mail fraud "must have been a target of the scheme to defraud **and must have relied to his detriment on misrepresentations** made in furtherance of the scheme." *Id.* at 1499-1500.

[22] As Justice Frankfurter observed, "[i]n law . . the right answer usually depends on putting the right question." *Estate of Rogers v. Comm'r of Internal Revenue*, 320 U.S. 410, 413 (1943).

Neither § 1962 nor § 1964(c) mention "reliance" as a requirement for RICO liability or proof of damages. A common law fraud claim often (but not always) required proof that the defrauded plaintiff relied upon the misrepresentation, and some courts have incorrectly imported this requirement into RICO actions involving mail or wire fraud. *See Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 104 & n.3 (1st Cir. 2002) (collecting cases requiring "reliance" but rejecting argument that "reliance" is required element of RICO claim). RICO bases its own brand of civil liability on the commission of specified criminal acts (here, mail and wire fraud) so long as they comprise a "pattern of racketeering activity." Criminal fraud under these statutes does not require "reliance" by anyone: It is enough that defendant sought to deceive, whether or not he succeeded. *Neder v. United States*, 527 U.S. 1, 24 (1999) ("The common-law requirement[] of 'justifiable reliance' has no place in the federal fraud statutes."); *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989) (mail fraud conviction upheld even though misrepresentations were not made to individual who suffered loss).

The mail fraud statute was drafted in a "sufficiently general" fashion to apply to a broad range of schemes. *United States v. Maze*, 414 U.S. 395, 399 n.4 (1974). Whether criminal fraud required "reliance" at common law varied with the particular form of fraud.[23] The statute is

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[23] *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., CRIMINAL LAW §§ 8.6-8.7 (2nd ed. 1986) (discussing requirements for various forms of common law criminal fraud). The crime of false pretenses may be considered the "classical" criminal fraud at common law, *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 & n.161 (2001), and that crime contains a reliance requirement. *See Systems Mgmt.*, 303 F.3d at 104 n.4. *Durland v. United States*, 161 U.S. 306 (1896), held that the phrase "scheme to defraud" in

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frequently applied to complex third-party transactions that potentially inflict injury upon victims who do not "rely upon" the misrepresentations. *See* Goldsmith & Tilton, *Civil Racketeering Cases*, 59 WASH. & LEE L. REV. at 86-87 & nn.12-20 (collecting cases). Under a literal reading of §§ 1961, 1962 and 1964 of RICO, which is the presumptive choice in interpretation, nothing more than the criminal violation and resulting harm is required. As the First Circuit made clear in *Systems Mgmt.*, 303 F.3d at 104, "[t]here is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO."

2. *Ideal's* Reliance Upon Petitioners' Predicate Acts Is Not The Only Way To Allege Proximate Causation

Reliance is a specialized condition that happens to have grown up with common law fraud. While reliance by the victim is one way in which fraud can cause harm, it is not the only way to allege and prove causation under § 1964(c). *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), a civil RICO case, stated that "[i]n some cases, reliance may be 'a milepost on the road to causation.'" *Id.* at 664 (quoting *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975) (fraud-on-the-market presumption of reliance)). But is not "the **only way** plaintiffs can establish causation in a civil RICO claim predicated on mail fraud." *Id.* at 666 (emphasis in original); *accord Living Designs,*

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the mail fraud statute is not limited to facts that would fall within the common law crime of obtaining money by false pretenses or the common law tort of deceit; indeed, it involves any form of "trick, deceit, chicane or overreaching." *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (citations omitted).

Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 363 (9th Cir. 2005) (declining to "announce a black-letter rule that reliance is the only way plaintiffs can establish causation" in RICO claim).

The Solicitor General recognizes that reliance by a third party ("someone" other than the plaintiff) will suffice to allege (and prove) causation. Three months ago, in *Bank of China v. NBM L.L.C.*, 359 F.3d 171 (2nd Cir. 2004), *cert. granted*, ___ U.S. ___, 125 S. Ct. 2956 (2005), *cert. dismissed*, ___ U.S. ___, 126 S. Ct. 675 (2005), the Solicitor General filed an *amicus curiae* brief (at this Court's request) addressing "whether civil RICO plaintiffs alleging mail and wire fraud as predicate acts must allege 'reasonable reliance' under" § 1964(c). The Solicitor General asserted that "a RICO plaintiff alleging a RICO violation based on mail or wire fraud must show reliance on the defendants' misrepresentations in order to establish that the RICO violation proximately caused its injury," explaining that a misrepresentation cannot cause injury "unless **someone** relies on it." Brief for the United States, at 8 (Oct. 31, 2005) (emphasis in original). But the Solicitor General made clear that "nothing in the language of RICO precludes the assertion" of "a theory of third-party reliance," *id.* at 9, stating that "the plaintiff must show that **either it or a third party justifiably relied** on the misrepresentations or omissions made to accomplish the fraud." *Id.* at 11.[24] Endorsing the Second Circuit's decision

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[24] *See also id.* at 12 n.7 (recognizing that "a plaintiff can establish the requisite causation by proof that **a third party relied** on the defendants' misrepresentations"); *id.* at 21 ("Civil RICO requires reliance by **someone** when the predicate offenses involve fraud in order to establish the requisite causal link between the injury and the RICO violation, but not necessarily reliance **by the plaintiff**") (second emphasis in original). The Solicitor General also observed: "[A] common law fraud claim might succeed **despite the fact that the fraudulent**

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in this case, the Solicitor General stated that "[m]any courts of appeals ... have recognized that third-party reliance is a viable avenue of causation, at least where the plaintiff is the 'direct target' of the defendant's scheme." *Id.* at 22 (citations omitted).

Here, the Second Circuit's analysis is entirely consistent with the position taken by the Solicitor General. The court below traced its post-*Holmes* RICO causation jurisprudence, JA 40-46, before stating that in cases "in which we approved the summary dismissal of the complaint, the plaintiffs were not **competitors of the racketeering enterprise or targets of alleged racketeering activity**." JA 46 (citing, *inter alia*, *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 124 (2nd Cir.), *cert. denied*, 540 U.S. 1012 (2003) ("[W]e have repeatedly emphasized that **the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise**.") (citations omitted)).[25]

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misrepresentation was made to a third party." Brief for the United States, at 21 n.13 (quoting *Steamfitters Local Union No 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 935 n.19 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000)). Thus, while reliance may have been required in the "ordinary misrepresentation case," Pet. Br. at 29 (which this case is not), the common law consistently recognized the doctrine of third-party reliance.

[25] Judge Posner explained "intended victim" in *Matter of EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991), in which defendants allegedly sold an unprofitable division as part of a leveraged buyout and schemed to keep the buyer afloat long enough to satisfy the Pension Benefits Guaranty Corp. ("PBGC") that the pension obligations of the seller could be assumed by the buyer. After that time, the buyer went bankrupt. Creditors of the buyer had standing to bring a RICO claim because even though the PBGC was the "primary" target, fooling the creditors was an intended step in the scheme: "**One can be an intended victim without being the primary victim.** That is this case, and it is different from a case of transferred intent. Suppose you blow up a plane carrying X and Y in order to kill X. If both die in the explosion, you are

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The view that a competitor alleging injury to its business resulting from racketeering activity of a defendant competitor adequately pleads proximate cause is consistent with the majority and minority opinions in *Sedima*, 473 U.S. at 495-96 & 497 n.15; *see also id.* at 519-20 (Marshall, J., dissenting). Post-*Holmes* decisions recognize that injured competitors that assert claims like those asserted by Ideal satisfy RICO proximate causation. In *Commercial Cleaning*, the Second Circuit reversed the dismissal of a RICO complaint alleging that plaintiff's competitor had engaged in a pattern of racketeering activity, namely, knowingly hiring undocumented aliens in violation of 8 U.S.C. § 1324, which "enabled [the defendant] to lower its variable costs and thereby underbid competing firms, which consequently lost contracts and customers to [the defendant]." 271 F.3d at 378. The court noted that the plaintiff

> was not alleging an injury that was derivative of injury to others. Commercial does not seek to recover based on the misfortunes visited upon a third person by the defendant's acts. . . . It claims to have lost profits directly as the result of [the defendant's] underbidding, which it achieved through its violation of § 1324(a). . . . **We have stated a plaintiff has standing where the plaintiff is the direct target of the RICO violation. . . . [T]he theory of Commercial's**

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just as much Y's murderer as X's, not because of the fiction of transferred intent but because you knew that Y (or any other person who might be a passenger on the plane) would die if your plot against X succeeded. It is not a transferred-intent case because nothing went wrong with your plan; it is a case of extreme recklessness, equated to deliberateness. You killed Y for an ulterior motive, it is true, but most murders have ulterior motives." *Id.* at 1279 (citations omitted). *See also Diaz v. Gates*, 420 F.3d 897, 901-02 (9th Cir. 2005).

> **claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals, thus qualifying them as direct targets of the RICO violation.**

Id. at 384. In *Baisch v. Gallina*, 346 F.3d 366 (2nd Cir. 2003), another third-party scheme to defraud RICO case, the court rejected the premise that only one category of victim has standing to sue. The foreseeability component of proximate cause is established where the plaintiff was a "target[]" and "intended victim[] of the racketeering enterprise," *id.* at 374, even if it was not the primary target or victim, and "[n]o precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing." *Id.* at 375.[26]

In addition to Second Circuit precedents, the court below relied on *Mid Atlantic*, which held that a competitor had standing to sue under RICO where the racketeering was mail fraud in communications from defendants to plaintiff's customers. 18 F.3d at 261-64; *see* JA 49-50. Plaintiff Mid Atlantic and defendant LDS were resellers of long-distance telecommunications services competing for

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[26] In *Baisch*, 346 F.3d at 372-73, the Second Circuit focused on proximate cause and eliminated any "zone-of-interest" analysis to determine standing, which the Eighth Circuit had applied independently from the proximate cause analysis adopted in *Holmes*. *See Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000), cited in Pet. Br. at 17, 22 & n.6. *Baisch* stated that proximate cause analysis "adequately incorporates the zone-of-interest test's concerns," and that "it is inappropriate to apply a zone-of-interests test independent of this circuit's proximate cause analysis." 346 F.3d at 373. Petitioners ignore *Holmes*, 503 U.S. at 280 (O'Connor, White and Stevens, JJ., concurring), which rejected a "zone-of-interest" analysis and made clear that RICO does **not** incorporate the standing requirements of the predicate acts.

the same customers. LDS engaged in a pattern of fraudulent mailings, soliciting customers by offering them artificially low rates, lower than Mid Atlantic's basic rates, forcing Mid Atlantic to meet the apparently lower LDS rates. However, "[i]n practical effect, . . . the quoted [LDS] rates were not [as] low [as had been represented], since additional minutes were randomly and artificially added [by the defendants] to the lengths of telephone calls" made by LDS customers. *Id.* at 261. LDS contended that "Mid Atlantic d[id] not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did"; that, therefore, defendants' "customers were the only victims of the alleged fraud"; and, hence, "the [defendants'] solicitations could not have been the proximate cause of Mid Atlantic's injuries." *Id.* at 263.

The Fourth Circuit rejected these contentions and vacated dismissal of the complaint because Mid Atlantic was "not seeking [either] to vindicate the rights of its former customers who may have been offered fraudulently low rates" or to recover for injuries "derivative of any losses suffered by its former customers." *Id.* at 264. Rather, "Mid Atlantic alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor." *Id.* at 263. The court recognized that there may be more than one category of victims to whom a defendant's conduct can proximately cause injury, and that although the customers may have been the most direct victims of defendants' alleged frauds, Mid Atlantic "claim[ed] distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match [the defendants'] fraudulent ones." *Id.* at 264. "Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, [the

individual defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers)." *Id.* at 263.[27]

These cases are consistent with *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2nd Cir. 1990) ("*LILCO*"), another case cited by the court below. JA 50-51. In *LILCO*, Suffolk County asserted a RICO claim alleging that LILCO and its officers committed mail fraud in the course of Public Service Commission ("PSC") proceedings, inducing the PSC to grant LILCO unwarranted and excessive rate increases. Noting that the "by reason of" phrase in § 1964(c) "requires that there be a causal connection between the prohibited conduct and plaintiff's injury," 907 F.2d at 1311, the Second Circuit stated that "[i]n the context of this case, which involves RICO mail fraud claims, this means that it was necessary for **Suffolk** to demonstrate at trial that LILCO's misrepresentations to the PSC **were relied upon by the PSC."** *Id.* (emphasis added). The Second Circuit plainly recognized that a plaintiff who is injured as a proximate result of fraud should be able to recover **regardless of whether he or a third party is the one deceived**. Petitioners ignore *LILCO*, even though it was cited with approval in *Holmes*.[28]

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[27] *Accord Pharmacare v. Caremark*, 965 F. Supp. 1411, 1421 (D. Haw. 1996) (defendants bribed physicians to induce them to prescribe defendants' product rather than plaintiffs' product, citing *Mid Atlantic*, court holds that proximate causation satisfied; "Defendants' alleged perpetration of fraud on its patients could foreseeably affect the Plaintiffs who are also trying to entice those same customers"; "In addition, Plaintiffs have pled that they were the targets of the fraud.").

[28] *Holmes*, 503 U.S. at 272 n.19, recognized that customers of the broker-dealers who had purchased manipulated securities "were

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After citing the relevant precedents, JA 51-53, the Second Circuit delineated "the principle governing" the present case:

> [W]here a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. **This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.**

JA 53 (emphasis added). Contrary to Petitioners' assertion (Pet. Brief 23-24), the court correctly applied the governing principle to Ideal's allegations:

> Ideal alleged facts sufficient to show that its claimed loss of business was proximately caused by defendants' operation of National's stores

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victims of" Holmes' schemes to defraud, including securities "parking" transactions. In support of the proposition that "the broker-dealers' customers might be proximately injured by" offenses of mail fraud, wire fraud and securities fraud, *id.*, this Court cited *LILCO*, 907 F.2d at 1311-12, and *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991). In *Taffet*, utility customers asserted RICO claims against utilities that had engaged in fraud that resulted in higher rates, namely, subverting the ratemaking process by presenting false and misleading information to the Alabama and Georgia Public Service Commissions ("PSC") via mail and wire fraud. 930 F.3d at 850. Reversing dismissal of RICO claims on the ground that customers failed to assert cognizable injury proximately caused by the utilities' scheme to defraud, the Eleventh Circuit stated that "**the plaintiffs cannot be said to have no cognizable right to pay anything but the fraud-induced rate. The cognizable injury is therefore money lost as a result of fraud upon the state agency.**" *Id.* at 857 (emphasis added).

> through a pattern of racketeering activity. . . . [D]efendants' "cash, no tax" scheme was implemented for the purpose of diverting customers from Ideal, which collected the sales taxes required by law, to National, which did not. Given that Ideal and National sell substantially the same products and that their retail stores are but minutes apart, the lower bottom-line cost available to cash purchasers from National as a result of not paying sales tax influenced some customers to purchase from National rather than from Ideal.
>
> Defendants' mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the "cash, no tax" scheme, for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. **The principal intended victim of the scheme was Ideal**, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. . . . **Ideal, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants** for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

JA 53-54 (emphasis added).[29]

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[29] *Accord City of New York v. Cyco.Net, Inc.*, 383 F Supp. 2d 526, 556-60 (S.D.N.Y. 2005) (city's RICO action alleged that out-of-state vendors conspired to sell cigarettes to city residents via the Internet without paying state taxes; "the fact that the State [of New York], a

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Other courts recognize that a business entity injured by a campaign of misinformation, bribes, or other wrongful activity directed at its customers suffers an injury to its "business or property" that is proximately caused by the competitor's pattern of racketeering activity, especially where it alleges that it was the **direct target** of the scheme.[30] In *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), the Fifth Circuit reversed the dismissal of RICO claims asserted by household products manufacturer P&G against its competitor arising out of Amway distributors' dissemination to customers, via mail and wire fraud, of rumors of P&G's link to Satanism. *Id.* at 542-44, 564. P&G's RICO claims were dismissed because it could not "claim to have relied on any of the misrepresentations that Amway allegedly make via mail and wire." *Id.* at 564. Following *Mid Atlantic* and its own pronouncement in *Summit Props.* that a "target" of a scheme to defraud that did not itself rely on the fraud may pursue a civil RICO claims if other elements of proximate causation are

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third party, was deceived, has no bearing on the question of proximate cause").

[30] *See, e.g., Israel Travel Adv. Svc., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995) ("we . . . accept *Mid Atlantic*"); *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 151-52 (5th Cir. 1997) (same), *vacated on other grounds as moot*, 525 U.S. 979 (1998); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3rd Cir. 1998) (commercial bribery and extortion designed to steal plaintiff's customer; plaintiff's business relationship with customer was "direct target of the alleged scheme – indeed, interference with that relationship may well be deemed the linchpin of the scheme's success"); *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000) (recognizing that "defendants' competitors might recover for injuries to [their] competitive position"); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 221-24 (5th Cir. 2003) (same).

present, the Fifth Circuit said that third-party reliance more than suffices: "P&G has alleged that using the wire and the mail, Amway attempted to lure P&G's customers away by fraud. Although P&G did not rely on the fraud, . . . if P&G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation." 242 F.3d at 565. These cases recognize that it matters not what form the defendant's wrongful (or anti-competitive) conduct might take – whether threats of violence, extortion, bribery, or misrepresentations – but to the extent that "reliance" is required, third-party reliance will suffice and the RICO claim must be upheld.[31]

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[31] *See, e.g., Cox*, 17 F.3d at 1398-1403 (bribes in form of personal pension benefits, granted by employer to union negotiators, caused RICO injury to union members who returned to work under less favorable conditions); *Advance Relocation & Storage Co. v. Local 814, Int'l Brotherhood of Teamsters, AFL-CIO*, 2005 WL 665119, *4 (E.D.N.Y Mar. 22, 2005) (extortion and threats of violence "aimed at limiting competition" in commercial moving industry), *Dooley v Crab Boat Owners Ass'n*, 2004 WL 902361, *7 (N.D. Cal Apr 26, 2004) (same; crab harvesting industry); *Southern Intermodal Logistics, Inc. v D J. Powers Co.*, 10 F. Supp. 2d 1337, 1355-56 (S.D Ga 1998) (misrepresentations to potential customers); *In re Amer. Cont. Corp./Lincoln Savs & Loan Secs Litig.*, 794 F. Supp. 1424, 1465 (D. Ariz. 1992) (misrepresentations and undue political influence to deceive or fend off regulators so fraudulent sales of securities could continue); *Texas Air Corp. v. Air Line Pilots Ass'n Int'l*, 1989 WL 146414, *4-5 (S.D Fla. July 14, 1989) (misrepresentations to government agencies, public and airline employees); *Lewis v. Lhu*, 696 F. Supp. 723, 727-28 (D D.C. 1988) (misrepresentations and threats to customers); *Shaw v. Rolex Watch U S.A., Inc.*, 726 F. Supp. 969, 971-73 (S.D.N Y. 1989) (misrepresentations to Customs officials), *Galeria Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1286-87 (S.D N.Y. 1988) (misrepresentations to customers), *SJ Advanced Tech & Mfg. Corp v. Junkunc*, 627 F. Supp. 572, 576 (N.D. Ill. 1986) (misrepresentations to government agencies), 2 Mathews, CIVIL RICO LITIGATION § 8.04[C][3][b][i]-[ii] (RICO claims brought by injured competitors).

D. At Common Law, Ideal Could Maintain A Fraud And Deceit Claim By Alleging And Proving Third-Party Justifiable Reliance

Third-party reliance has deep roots in common law fraud actions, manifested in an unbroken line of cases stretching back more than 130 years and not cabined to "limited exceptions." Pet. Br. at 33-34. In *Rice v. Manley*, 66 N.Y. 82, 87 (1876), a seller agreed by unenforceable contract to sell certain cheese to the plaintiffs. The defendant falsely represented to the seller that the plaintiffs no longer wanted the cheese and the seller, induced thereby, sold the cheese to the defendant instead. The Court of Appeals held that a fraud action was maintainable: "[I]t matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences." This was the rule followed at common law because "[w]here defendant's fraud adversely affects plaintiff through inducing action by a third person, denying recovery on the ground that there has been no actual reliance by the plaintiff is hard[] to justify." 2 Fowler V. Harper & Fleming James, Jr., THE LAW OF TORTS § 7.13, at 470 (2nd ed. 1986) ("Harper & James, LAW OF TORTS").[32]

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[32] The treatise cites *Rosenbluth v. Sackadorf*, 76 N.Y.S.2d 447 (Sup. Ct. 1947), *rev'd on other grounds*, 79 N.Y.S.2d 524 (App. Div. 1948), in which landlords made fraudulent misstatements to the Office of Price Administration ("OPA") and to the court in order to evict a tenant who was protected in occupancy by federal statutes except where the premises were wanted for certain limited purposes (*e.g.*, self-occupancy). The landlords (like Petitioners here) asserted that if any fraud were committed by them, it was against the OPA and the court and not against the plaintiff. 76 N.Y.S.2d at 449. Because the "defendants' ultimate motive was to defraud the plaintiff," the court stated

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Three years ago, the Supreme Court of New York cited *Rice* (among other early New York cases) for the proposition that it is "relatively well settled" that "fraud may exist where a false representation is made to a third party, resulting in injury to the plaintiff." *Ruffing v. Union Carbide Corp.*, 764 N.Y.S. 2d 462, 465 (App. Div. 2003). *Ruffing* held that a surviving child who was injured *in utero* as the result of a fraudulent statement relied upon by his mother had a valid fraud action. *Id.* at 466-67. Other recent New York cases agree. *See Desser v. Schatz*, 581 N.Y.S. 2d 796, 797 (App. Div. 1992) ("[D]efendants . . . falsely stated to Chemical that a mortgage was fully paid up when it was not. . . . Reliance by Chemical, to the clear detriment of plaintiff, is manifest, and it is of no moment, in this context, that the false representation was not made directly to plaintiff."); *Buxton Mfg. Co. v. Valiant Moving & Storage, Inc.*, 657 N.Y.S. 2d 450, 451 (App. Div. 1997) ("It is generally the case that a cause of action to recover damages for fraud requires, *inter alia*, a showing that a false representation was made to the injured party, for the purpose of inducing reliance thereon, and reasonable reliance by the injured party. . . . **Fraud, however, may also exist where a false representation is made to a third party, resulting in injury to the plaintiff.**") (citations omitted).[33]

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that "[t]heir liability to the plaintiff . . is the same as if the false representations had been made directly to him." *Id.* (citing, *inter alia*, *Eaton Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 33-34 (1880) (third-party reliance is sufficient to sustain common law fraud claim) (cited in Pet. Br. at 33 n.9)); *see also Bruff v. Mali*, 36 N.Y. 200, 205-06 (1867) (same).

[33] *See also Cooper v. Weisblatt*, 277 N.Y.S. 709, 714 (App. Div. 1935) (fraud was sufficiently alleged where the plaintiff agreed to have claims against him resolved by "Din Torah" before a tribunal of three rabbis

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In contending that such third-party reliance is "unprecedented" under the common law, Petitioners ignore over 130 years of New York case law. *Compare* Pet. Br. at 31-34 *with N.B. Garments (Pvt.) Ltd. v. Kids Int'l Corp.*, 2004 WL 444555, *3 n.5 (S.D.N.Y. Mar. 10, 2004) ("**New York law has, since the 1800's, allowed for fraud claims based on third-party reliance.**") (citations omitted). The rule followed by the Second Circuit in this case (JA 53-54) is consistent with the common law of fraud applied since the 19th Century.[34]

E. Under The Restatement, The Intentional Nature Of Petitioners' Racketeering Scheme Must Be Taken Into Account In Determining Whether Proximate Causation Has Been Alleged

Common law proximate causation drew sharping distinctions between acts that are deliberate and intentional and those involving mere negligence. Contrary to Petitioners' assertion, *see* Pet. Br. at 11, 31-32, that their motive and intent is irrelevant, the law has a strong

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and defendants fraudulently induced two of the rabbis' signatures on fictitious decision providing that mortgage held by plaintiff should be discharged), *Piper v Hoard*, 107 N.Y. 73, 79 (1887) (where marriage was fraudulently induced by defendant's misrepresentation that any child of marriage would inherit certain property, such child later born may sue as "the very person injured by the fraud").

[34] Supposedly contrary cases cited by Petitioners actually "address situations presenting a risk of far-flung liability for inchoate or unintended injuries." *Fromer v. Yogel*, 50 F. Supp 2d 227, 243 (S.D.N.Y. 1999) (citations omitted). "[I]ndirect reliance is insufficient when a plaintiff's injury is an unintended or remote consequence of a defendant's misrepresentations." *Id.* at 244. Because Ideal's injuries are an intended consequence of the racketeering scheme, even Petitioners' cases permit recovery.

interest in deterring intentional efforts to harm others. The RESTATEMENT (SECOND) OF TORTS widens the scope of liability for intentional acts, particularly where there is a high degree of moral culpability. Under Sections 435A and 435B,[35] liability for unintended resulting harm is based upon proof of the tortfeasor's wrongful intent, consideration of the degree of moral wrong, and the seriousness of the harm which he intended. *Mayer v. Town of Hampton*, 497 A.2d 1206, 1210 (N.H. 1985) (citations omitted). Although Petitioners assert that the RESTATEMENT is "the most widely accepted distillation of the common law of torts," Pet. Br. at 27 n.7 (quoting *Field v. Mans*, 516 U.S. 59, 70 (1995)), they ignore Sections 435A and 435B.[36]

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[35] With most cases of intentional torts, "[t]he defendant's liability for the resulting harm extends . . . to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim." Keeton, THE LAW OF TORTS, § 9 at 40 (footnote omitted). Sections 435A and 435B relate to causation and liability: "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where the harm results from an outside force the risk of which is not increased by the defendant's act." RESTATEMENT § 435A. This section recognizes "a cause of action in favor of a person where the defendant acted for the purpose of harming him," such as "**where a person defrauds another for the purpose of causing pecuniary harm to a third person.**" *Id.*, cmt. A (citing RESTATEMENT § 870). "Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm." *Id.*, § 435B.

[36] The traditional rule stated. "Where the plaintiff sustains injury from the defendant's conduct to a third person it is too remote, . . **unless the wrongful act is willful for that purpose.**" J G Sutherland, A TREATISE ON THE LAW OF DAMAGES 68 (2nd ed 1893) Sutherland's 1916 treatise elaborated on "willful for that purpose." J G.

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Petitioners' "cash, no tax" scheme can only be characterized as a criminal fraud. The degree of Petitioners' moral wrong, and the seriousness of the financial injury they inflicted upon Ideal, are factors that weigh heavily in favor of finding proximate causation in this case.

F. Affirming The Second Circuit's Decision Will Not Open "Floodgates" Of RICO Litigation

In a last-ditch effort to convince this Court to rewrite the statute, abandon its precedents overturn the decision of the court below, Petitioners summon the oft-cited parade of horribles that will befall the federal courts when they are accordingly beset by RICO claims. Petitioners cite a speech delivered by former Chief Justice Rehnquist in 1989, Pet. Br. at 35-36, ignoring the majority opinion he authored in *NOW I* five years later: "'[T]he fact that RICO has been applied in situations not expressly anticipated by

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Sutherland, A TREATISE ON THE LAW OF DAMAGES 128 (John R Berryman, ed., 4th ed. 1916). That edition used an illustration in which defendant induced a ship captain to move his ship. The captain, believing defendant to be the harbor master, followed the instruction. The plaintiff – the wharf owner who suffered a loss of rent – was allowed to recover "if the defendant acted with a malicious and fraudulent design to injure the plaintiff." *Id.* (citing *Gregory v Brooks*, 35 Conn 437, 446 (1868)), *see also Derosier v. New England Tel. & Tel Co.*, 130 A 145, 152 (N.H. 1925) ("For an intended injury, the law is astute to discover even very remote causation."); *Burckhardt v. Burckhardt*, 42 Ohio St 474, 487 (1885) ("In cases of willful or malicious injury, and injury from reckless or illegal acts, or from positive fraud, the damages are not so strictly confined to proximate consequences as when these elements do not exist. . . ."); 2 Harper and James., LAW OF TORTS, § 6.1 at 270 ("If the harm was intentionally caused by the defendant, there is no difficulty about the problem of legal causation, since all intended consequences are legal or proximate.") (footnote omitted); *id*, vol 4, § 20 5 at 133 n.1 ("Foreseeability is not a limitation on liability for intended consequences, which are always proximate") (citation omitted).

Congress does not demonstrate ambiguity. It demonstrates breadth.'" 510 U.S. at 262 (quoting *Sedima*, 473 U.S. at 499). Concurring in the majority opinion in *Holmes*, Justices O'Connor, White and Stevens stated that "if Congress ha[s] legislated the elements of a private cause of action for damages, the duty of the Judicial Branch [is] to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability." 503 U.S. at 285 (citation omitted). Petitioners' complaints about RICO's deliberately broad reach (Pet. Br. at 35-36, 41-43) should be directed to Congress, not this Court.

Nor can Petitioners complain about the supposed volume of RICO litigation supposedly clogging the federal courts, Pet. Br. at 41-43, because RICO cases make up an almost infinitesimal portion of federal court civil dockets:

U.S. District Courts – Civil Cases Commenced on Basis of Jurisdiction and Nature of Suit, During 12-Month Periods Ending March 31, 2001-March 31, 2005

Type of Case	2001	2002	2003	2004	2005	Avg.
Civil Cases	**254,523**	**265,091**	**256,858**	**255,851**	**278,712**	**262,207**
Contract	48,927	38,535	33,288	30,512	28,652	35,983
Tort	34,424	52,366	46,629	45,891	52,489	46,360
ERISA	9,633	10,787	11,229	11,499	11,391	10,908
Securities	2,831	3,595	3,468	3,100	2,707	3,140
Antitrust	810	709	863	715	792	778
RICO	**791**	**707**	**845**	**695**	**840**	**776**

U.S. Admin. Office of Courts, FEDERAL JUDICIAL CASELOAD STATISTICS, Table C-2 (Mar. 31, 2001-Mar. 31, 2005). RICO cases represent less than 0.03% of federal case filings, and their incidence has dropped by about one-third since 1996. Blakey & Roddy, *Reflections*, 33 AMER. CRIM. L. REV. at 1616.

There is nothing inconsistent between the Second Circuit's analysis of Petitioners' anti-competitive behavior, JA 53-54, and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). Although antitrust, RICO and state law unfair competition or tort claims can arise from the same anti-competitive conduct, *see Agency Holding Corp.*, 483 U.S. at 145-46, 149, 151-53, such claims involve entirely different elements. Antitrust and RICO claims require separate analysis, as set forth in *Nynex*, where the Second Circuit found that plaintiff had sufficiently alleged antitrust claims but had not alleged RICO claims. *Discon, Inc. v. Nynex Corp.*, 93 F.3d 1055, 1058-62 (2nd Cir. 1996) (antitrust claims); *id.* at 1062-64 (RICO claims), *vacated sub nom.*, 525 U.S. 128 (1998); *see also Z-Tel Comm., Inc. v. SBC Comm., Inc.*, 331 F. Supp. 513, 521-48, 557-63 (E.D. Tex. 2004) (offering separate analysis of antitrust and RICO claims).

Recognizing Ideal's standing to sue Petitioners will not open the floodgates of "accounting fraud" RICO litigation any wider than that permitted by *Reves*, 507 U.S. at 183, because professionals cannot be held liable under § 1962(c) unless they "participate[] in the operation or management of the enterprise itself." Congress removed the predicate act of "fraud in the sale of securities" more than a decade ago, when it enacted the Private Securities Litigation Reform Act of 1995. *Compare* 18 U.S.C.

§ 1964(c) and *In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 618-24 (S.D. Tex. 2003) *with* Pet. Br. at 40-41. The fact that Petitioners cannot cite a single civil RICO case brought by a competitor alleging a corporate defendant's "accounting fraud" scheme (Pet. Br. at 42-43 & n.12) shows how fanciful this hypothetical is.

CONCLUSION

For the reasons stated herein, the judgment of the Second Circuit should be affirmed, and this case should be remanded to the district court for trial.

DATED: February 16, 2006

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND NATIONAL STEEL SUPPLY, INC.,
Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RULE 29.6 STATEMENT

Petitioners' 29.6 Statement was set forth at page ii of petitioners' opening brief, and there are no amendments to that Statement.

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INTRODUCTION

This Court has held that civil RICO plaintiffs must plead and prove proximate causation – including a direct relationship between the harm claimed by the plaintiff and the alleged illegal conduct of the defendant. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Additionally, civil RICO, understood in light of its common law background, requires plaintiffs seeking to recover for economic harm caused by intentional misrepresentations to prove their reliance on those misrepresentations. Ideal has not adequately alleged either element, and the district court's dismissal of this suit must therefore be reinstated.

Ideal's rejoinder is both incomplete in its recitation of the applicable principles and sweeping in its policy implications. In Ideal's view, any civil plaintiff who can allege an injury bearing some causal relationship to a misrepresentation arguably in violation of the very broad mail or wire fraud statutes can assert RICO claims, threatening the alleged entity making those misrepresentations – typically a legitimate business – with liability for treble damages and attorneys' fees. Ideal's theory has no logical stopping point. It makes no difference how indirect or tangential is the causal link between the misrepresentation and the harm – all remote consequences are actionable and reliance by the plaintiff should never be required. *See, e.g.*, Resp. Br. 32 ("nothing more than the criminal violation and resulting harm is required"). Neither this Court's precedents nor the common-law moorings of the civil RICO action, however, permit Ideal's theory.

I. IDEAL'S ALLEGED LOST PROFITS ARE NOT AN INJURY "BY REASON OF" NATIONAL'S ALLEGED MISREPRESENTATIONS

RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of the statute. 18 U.S.C. § 1964(c). Under *Holmes*, a civil RICO plaintiff must show that its claimed injury was both factually caused and proximately caused by the defendant's illegal conduct. *See* 503 U.S. at 265-68.

Ideal's complaint fails to allege proximate causation for two independent reasons: (1) the connection between the alleged illegal conduct of National and Ideal's claimed injury is too attenuated; and (2) Ideal was not defrauded and therefore cannot recover damages resulting from National's alleged fraud against New York.[1]

A. Ideal Failed To Plead A "Direct Relation Between The Injury Asserted And The Injurious Conduct Alleged"

As Ideal concedes (at 22), *Holmes* demands a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268-69. But Ideal would confine that holding of *Holmes* to a rigid formalism – so-called "proper" plaintiffs can sue, but their creditors cannot. *See* Resp. Br. 23 ("Ideal is the proper plaintiff to sue Petitioners, and *Holmes* would only defeat its RICO claims if the plaintiff was one of Ideal's **creditors** (banks, vendors, employees, etc.) that Ideal could not pay because it had been economically injured by Petitioners' racketeering scheme.") (underscoring added). But Ideal fails to explain both why it is the proper plaintiff and what limiting principle enables the court to draw the line allowing Ideal to benefit while excluding Ideal's creditors and suppliers.

Significantly, Ideal never comes to grips with two key facts: National is alleged to have defrauded the State of New York (not Ideal); and the harm claimed by Ideal (lost profits) directly resulted (on Ideal's version of the facts) from *legal* conduct, namely, the charging of lower prices by National. *See* Pet. Br. 15-17. Ideal offers no explanation for why it should be allowed to sue under these circumstances, and this

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[1] Ideal asserts violations of both § 1962(c) and § 1962(a), *see* JA 14-18, but it does not contend that the proximate-cause analysis applies differently to those two claims, *see* Resp. Br. 29 n.20. Thus, the two civil RICO counts in Ideal's amended complaint stand or fall together. Additionally, Ideal's assertion (*id.*) that § 1962(a) "was primarily directed" at practices like "money laundering" further underscores the confused nature of its claim, because Ideal did not allege money laundering as a predicate act in its amended complaint. *See* JA 15. Both civil RICO counts in Ideal's amended complaint fail to plead reliance.

Court has already rejected a similar argument in analogous circumstances. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983) ("Even though coercion directed by defendants at third parties in order to restrain the trade of 'certain' contractors and subcontractors may have been unlawful, it does not, of course, necessarily follow that still *another* party – the Union – is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.") (emphasis added).

Additionally, for the three reasons the *Holmes* Court gave for refusing to permit recovery by the indirect plaintiff, the district court's dismissal of Ideal's suit should be reinstated.

1. The *Holmes* Court explained that the primary reason for requiring a "direct relation between the injury asserted and the injurious conduct alleged" is that, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff 's damages attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269 (citing *Associated Gen. Contractors*, 459 U.S. at 542-43). The difficulties of such proof are manifest here.

It would be extraordinarily difficult for a fact-finder to determine whether Ideal was made worse off by National's alleged misrepresentations. *See* Pet. Br. 17-18. First, the trier of fact would have to determine the extent to which National's tax underpayments were actually reflected in the overall price paid for National's products. Second, it would have to judge the impact of National's prices on Ideal's sales, considering the variety of other factors that could have caused Ideal to lose sales, such as the superiority of National's products and service, competition from other suppliers, or performance issues that uniquely affected Ideal. Indeed, considering the myriad factors that affect a particular consumer's decision to make a particular purchase, the only way for Ideal to prove factual causation would be on a customer-by-customer basis, yet such an effort would transform this lawsuit into a difficult exploration of minute micro-economic data. Third, the jury would have to evaluate

the effect of Ideal's lost sales on its profitability. There are many other factors to which a drop in Ideal's profits could be attributed – including, potentially, poor business practices.[2] Thus, proving that Ideal would not have lost profits without National's alleged misrepresentations would be an unduly speculative exercise. *See Associated Gen. Contractors*, 459 U.S. at 542 ("Partly because it is indirect, and partly because the alleged effects on the [plaintiff] may have been produced by independent factors, the [plaintiff's] damages claim is also highly speculative.").

Ideal claims (at 24-25) that factual causation is not a problem in this case, however, because its clever pleading has eliminated all potential causes of its lost profits other than National's alleged misconduct. But Ideal's argument ignores *Holmes*. There, the Court was concerned with the "problems of *proving*" – not simply alleging – "factual causation." 503 U.S. at 269 (emphasis added). Accordingly, in concluding that the Ninth Circuit erred in reversing a grant of summary judgment for the defendant, the Court looked beyond the plaintiff's allegations to determine whether it would be sensible to require a trial court to sort through the various potential causes of the claimed loss to determine for what portion the defendant ought to be held responsible. *See id.* at 272-73 ("If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets.").

Thus, Ideal's allegations that "Ideal and National are **direct competitors**" (at 11) in a "zero-sum game" (at 18 n.13) cannot sweep away the leaps of faith that Ideal would ask a jury to make in awarding it damages. *Holmes* estab-

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[2] Given this Court's consideration of the plaintiff's possible "poor business practices" in *Holmes*, Ideal's assertion (at 25 n.17) – relying on cases from the Ninth Circuit – that such factors have no place in the proximate-cause analysis under civil RICO is particularly misplaced.

lished that trial judges are not required to shut their eyes to the complexities of the world in determining whether it would be " 'administratively possible and convenient,' " 503 U.S. at 268 (quoting W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 264 (5th ed. 1984) ("*Prosser & Keeton on Torts*")), to let the claim of an indirect plaintiff go forward.

Ideal also incorrectly claims (at 25) that it is "no less directly injured than the insolvent broker-dealers in *Holmes*." The broker-dealers in *Holmes* went bankrupt because they bought "*with their own funds*" substantial amounts of manipulated securities that dramatically decreased in value when the defendants' fraud was discovered. 503 U.S. at 262 (emphasis added). Thus, in *Holmes*, the broker-dealers were the defrauded parties and therefore the proper plaintiffs – just like New York would be here if the Attorney General thought the State had a case.

2. In *Holmes*, this Court bolstered its conclusion that the plaintiff could not show proximate cause by noting that, "[a]ssuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages." 503 U.S. at 273. Ideal concludes that this Court was concerned exclusively with avoiding the possibility that "any plaintiff will have been twice benefited." Resp. Br. 26.

But Ideal's theory of *Holmes* cannot be squared with the facts of that case. Both the customers (in the form of the SIPC) and the broker-dealers (in the form of the trustees) were parties to the litigation. *See* 503 U.S. at 262, 265 n.8. Presumably, it would have been fairly simple to differentiate what was lost by the customers (their stock and cash in their accounts) from what was lost by the broker-dealers (the value of their businesses). *See* Resp. Br. 6 & nn.23-25, 36-38 & n.179, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (No. 90-727) (explaining the Securities Investor Protection Act scheme and the various items of

damages sought by SIPC and trustees in that case). Thus, *Holmes* did not present a serious risk that plaintiffs would be compensated multiple times for the same loss.

Instead, *Holmes* presented a complication similar to the one here – that a court might have to attempt to apportion damages so that a defendant would not be forced to pay treble damages to various plaintiffs at different levels removed from the same underlying wrong. Significantly, Ideal does not dispute that, under its theory of proximate cause, the claims can get much more attenuated and the case can become even more complex. *See* Resp. Br. 27-28. In Ideal's view, nothing would prevent Ideal's suppliers from suing, claiming that they lost sales because of Ideal's lost sales attributable to the indirect effects of National's alleged tax fraud. Although Ideal offers an unprincipled and arbitrary limitation to deny recovery to its creditors, *see id.* at 26, its theory would force courts to try the claims of any other party that could claim injury from National's alleged tax fraud – no matter how remote and indirect.[3]

3. The third consideration informing *Holmes*'s directness requirement is that there is no need to "shoulder[ ]" the difficulties of adjudicating the claims of indirect plaintiffs when there is a direct victim "to bring suit for the law's vindication." 503 U.S. at 273. Although Ideal asserts (at 17) that it "is best equipped to serve as 'private attorney general' and effectively prosecute" National's alleged misconduct, New York is the direct victim of National's alleged misrepresentations. Even more so than the defunct broker-dealers in *Holmes*, the State can "be counted on to bring suit for the law's vindication." *Holmes*, 503 U.S. at 273. Thus, as in *Holmes*, there is no need to conscript trial courts to disentan-

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[3] In any event, even if this case does not present precisely the risk of multiple recoveries that this Court identified in *Holmes*, "the remote and obviously speculative character" of the harm that Ideal alleges is nonetheless "plainly sufficient to place it beyond the reach of" civil RICO. *Associated Gen. Contractors*, 459 U.S. at 545 n.52.

gle the causal and remedial complications presented by suits like Ideal's.[4]

Ideal misunderstands this Court's point when it claims (at 28-29) that the third *Holmes* reason does not apply here because recovery by New York would not remedy its lost profits. The issue is not whether recovery by the directly injured party will make the indirect plaintiff whole. Rather, direct plaintiffs "can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." 503 U.S. at 269-70. Thus, dismissing Ideal's suit does not threaten the public interest because New York can enforce the law against National, if state officials deem the law to need enforcing through this mechanism.[5]

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[4] Neither New York nor anyone else has brought an action arising from the conduct alleged here – a fact that does not support letting this suit go forward, as Ideal suggests (at 28 n.19). If anything, that fact casts doubt on the merits of Ideal's allegations. *See Associated Gen. Contractors*, 459 U.S. at 542 n.47 (observing that, "if there is substance to the [plaintiff's] claim, it is difficult to understand why [the] direct victims of the conspiracy have not asserted any claim in their own right"). Additionally, *Baisch v. Gallina*, 346 F.3d 366 (2d Cir. 2003), on which Ideal relies (at 36), is fundamentally different from this case. There, the plaintiff's injury was direct: the defendants defrauded the plaintiff by causing him to loan money under false pretenses. *See* 346 F.3d at 375.

[5] In footnote 19 of the *Holmes* opinion, the Court said only that customers of the broker-dealers who purchased the manipulated securities – and thus were themselves defrauded – "may" be able to sue. *See* 503 U.S. at 272 n.19. Additionally, the Court declined to "rule out" that a securities "parking" scheme "might [have] proximately injured" the broker-dealers' customers. *Id.* "Parking" refers to sham transactions in which broker-dealers move securities from the firm's inventory to the accounts of customers to circumvent the net capital requirements of 17 C.F.R. § 240.15c3-1. *See In re Applications of W.N. Whelen & Co.*, 50 S.E.C. 282 (1990). The connection between the parking scheme in *Holmes* and the customers' loss of property in their accounts was much more direct, in part because the purpose of prohibiting evasion of net capital requirements through "parking" is to protect customers by ensuring the solvency of broker-dealers.

B. Ideal Cannot Establish Proximate Causation Because It Was Not The Party Defrauded

It is well-settled that a plaintiff seeking to recover for a defendant's violation of a statute must be a member of the class of individuals that the statute was intended to protect. *See Prosser & Keeton on Torts* at 224-25; 1 J. G. Sutherland, *A Treatise on the Law of Damages* § 32, at 124 (4th ed. 1916). Here, Ideal seeks to recover for National's alleged violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. The purpose of those laws was to prevent wrongdoers from depriving persons of money or property by fraud. *See Cleveland v. United States*, 531 U.S. 12, 18-19 (2000); *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (mail and wire fraud statutes prohibit "scheme[s] to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises"); *see also* 18 U.S.C. § 1346 (deprivation of another's "intangible right of honest services"). Consequently, because National is alleged to have defrauded New York – and not Ideal – Ideal is not among those that the mail and wire fraud statutes are intended to protect. For that reason, Ideal has not alleged proximate causation, and it cannot recover. It is simply not "administratively possible and convenient," *Holmes*, 503 U.S. at 268, to hold violators of the mail and wire fraud statutes liable to parties that may have been harmed as a consequence of their actions when the parties themselves were not defrauded. *See* Pet. Br. 21-23.

The only response that Ideal can muster is to observe in a footnote (at 36 n.26) that a concurring opinion in *Holmes* would have held "that a plaintiff need not be a purchaser or a seller to assert RICO claims predicated on violations of fraud in the sale of securities." 503 U.S. at 276-77 (O'Connor, J., concurring in part and concurring in the judgment). But nothing in that opinion is inconsistent with the established common-law rule restricting recovery for violation of a statute to individuals the statute intended to protect. Rather, that opinion accords with the view that the securities laws were intended to protect all investors injured

by securities fraud, not just purchasers or sellers entitled to sue under the private right of action implied from § 10(b) of the Securities Exchange Act of 1934, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975).

To say that civil RICO does not incorporate the "standing" rules of the predicate statutes means little, as Justice O'Connor pointed out, *see Holmes*, 503 U.S. at 280, because most of those statutes are criminal laws, under which only the government has "standing" to sue directly. RICO indisputably gave to private parties the right to sue for violations of many criminal statutes. *See* 18 U.S.C. § 1961(1) (listing predicate acts that constitute "racketeering activity" under § 1962). But that does not mean that RICO abrogated the traditional common-law rule that a plaintiff cannot seek damages from a defendant who has violated a statute when the plaintiff is outside the class of individuals whom the legislature intended to benefit. Because Ideal has made no attempt to demonstrate that it suffered the type of harm that the mail and wire fraud statutes were intended to prevent, its suit must fail. *See Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995) (Easterbrook, J.); *cf. Holmes*, 503 U.S. at 286-90 (Scalia, J., concurring in the judgment).

C. Ideal's Responses Are Unpersuasive

1. Ideal asserts (at 11, 45-47) that it satisfied the proximate-cause requirement imposed by § 1964(c) as the alleged "target" and "victim" of National's alleged tax fraud. Under Ideal's view, any clever civil RICO plaintiff can include those labels in its complaint and thereby survive a motion to dismiss. But *Holmes*' requirement of a direct connection between the violation and injury cannot be circumvented so easily.

First, this Court has already rejected the claim that an allegation of intent to harm short-circuits the normal proximate-cause analysis. *See Associated Gen. Contractors*, 459 U.S. at 537 (passage cited to underpin civil RICO's proximate-cause requirement, *see Holmes*, 503 U.S. at 268-71); *see also* Pet. Br. 23-24. Establishing an objective

analysis, the Court refused to allow the indirect plaintiff's claim to proceed, even though it alleged "that the defendants intended to cause" the harm that it suffered. *Associated Gen. Contractors*, 459 U.S. at 537. "[A]n allegation of improper motive, although it may support a plaintiff's damages claim under § 4 [of the Clayton Act], is not a panacea that will enable any complaint to withstand a motion to dismiss." *Id.* (footnote omitted). *See also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) (holding that "[t]he availability of the §4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators"). Ideal cannot reconcile its intent-based approach with *Associated General Contractors*.

Second, Ideal cannot sweep away with mere pleading labels the difficulties in determining what, if any, portion of its lost profits can be fairly attributed to National's illegal conduct. Although a district court generally accepts the plaintiff's factual allegations when considering a motion to dismiss, "it is clear that the district judge does not have to accept each and every allegation in the complaint as true." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 463 (3d ed. 2004). In particular, "the district court is not bound by a pleading's . . . sweeping legal conclusions cast in the form of factual allegations." *Id.* at 521-40 (internal quotation marks omitted). Thus, this Court is not required to ignore the difficulties of proving factual causation here merely through Ideal's artful pleading to label itself the "target" and "victim" of National's conduct.

2. Perhaps recognizing that *Holmes* and *Associated General Contractors* are fatal to its claim, Ideal instead invokes (at 15-19) two other civil RICO decisions of this Court. Neither case supports Ideal.

Sedima. Ideal misleadingly suggests (at 16) that *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), authorizes recovery any time a defendant's racketeering activity injures a person's business or property – no matter how attenuated the connection between conduct and injury. That case did not so hold. There, the plaintiff's harm flowed *directly* from

the defendant's unlawful conduct. Two businesses entered into a joint venture; one company marketed the goods and the other procured and shipped them. The marketer alleged that the shipper repeatedly overcharged it, "cheating [it] out of a portion of its proceeds by collecting for nonexistent expenses." *Id.* at 484. *Sedima* is thus fundamentally different from this case – the direct effect of the alleged illegal conduct harms New York, not Ideal.

Ideal (at 35) and its amicus (at 21) are similarly misguided in contending that *Sedima* supports the view that a plaintiff claiming injury to its business resulting from alleged racketeering activity of a competitor has automatically established proximate causation. Rather than authorizing recovery for the type of indirect "competitive" injury at issue here, the majority in *Sedima* indicated that the proper civil RICO plaintiff is one who has been directly injured by a predicate act. After rejecting the court of appeals' "racketeering injury" requirement, the Court explained that "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow *from the commission of the predicate acts*." 473 U.S. at 497 (emphasis added).[*]

Although *Sedima* suggested that some "sort of competitive injury" might be compensable under civil RICO when the injury "flow[s] from the commission of the predicate acts," *id.* at 497 & n.15, it expressed skepticism that indirect competitive injuries were cognizable, *see id.* at 497 n.15. "Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that [harm] ultimately and indirectly flowing therefrom is." *Id.* Reject-

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[*] Ideal is similarly mistaken in asserting (at 13 n.10) that *United States v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989), "recognized" the "competitive advantage gained by National." That case in fact supports *National's* position and not Ideal's. The Second Circuit there upheld a RICO conviction of an individual who defrauded New York of state sales taxes. *See id.* at 1360-61 & n.2. Each of the defendant's state sales tax filings was considered a predicate violation of the mail fraud statute. *See id.* at 1356. *Porcelli*, however, provides no support for the notion that indirectly affected competitors can sue for treble damages under RICO when the State has been defrauded of tax revenues.

ing that "topsy-turvy approach," the Court found "no warrant in the language or the history of the statute for denying recovery thereunder to the direct victims of" the predicate acts, "while preserving it for the indirect." *Id.* (internal quotation marks omitted). Foreshadowing *Holmes* – where this Court closed the book on claims of indirect injury – *Sedima* thus strongly indicated that only direct victims of the predicate acts of racketeering activity are proper civil RICO plaintiffs.

Other statements in *Sedima* cast further doubt on Ideal's argument. The Court cautioned that a RICO violator "is not liable for treble damages to everyone he might have injured *by other conduct*." *Id.* at 496-97 (internal quotation marks omitted; emphasis added). Rather, the plaintiff "can only recover to the extent that[ ] he has been injured in his business or property *by the conduct constituting the violation*." *Id.* (emphasis added). Thus, when, as here, "the conduct constituting the [alleged] violation" directly harms a third party and the plaintiff claims an injury resulting directly from "other conduct" (here, the charging of lower prices), recovery under civil RICO is not appropriate.

National Organization for Women ("NOW"). Ideal erroneously claims (at 18) that its suit should proceed because it "satisfies the pleading standard for RICO standing reiterated in [*National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) ("*NOW*")]." But *NOW* addressed only standing under Article III. *See* 510 U.S. at 255-56. That case provides no guidance on pleading requirements for proximate cause in a civil RICO action. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 122 n.8 (2d Cir. 2003) (plaintiffs had "alleged an injury 'fairly traceable' to defendants' conduct, and therefore [met] the lesser burden for constitutional standing," even though their civil RICO claims failed for lack of proximate cause).

In any event, even if proximate cause had been at issue in *NOW*, that case, like *Sedima*, is quite unlike this one. The plaintiffs in *NOW*, women's health care centers, alleged that the defendant anti-abortion protestors "conspired to use

threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." 510 U.S. at 253. That case thus alleged a campaign of violence and threats of violence – constituting predicate violations of the Hobbs Act, 18 U.S.C. § 1951 – directed at the constituent parts of the plaintiffs' businesses.[7] This Court was not presented with anything resembling the present case, where a business seeks recovery for lost profits that it claims were indirectly facilitated by misrepresentations allegedly made to a third party in violation of the mail and wire fraud statutes.[8] No case cited by Ideal from this Court, therefore, supports the proposition that a plaintiff satisfies proximate-causation pleading requirements on such attenuated allegations. *Holmes* controls the result here: indirect plaintiffs such as Ideal cannot satisfy civil RICO's proximate-cause requirement.

3. Nor can Ideal draw support (at 16) from § 1964(c)'s use of the word "[a]ny" in the phrase "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue." 18 U.S.C. § 1964(c). The statute does not permit *any person* to sue. It provides a cause of action to "[a]ny person injured" "*by reason of*" a RICO violation. *Id.* (emphasis added). Under the statute's plain terms, persons who cannot show proximate cause cannot sue. *See Holmes*, 503 U.S. at 265-68. Nothing about the use of the word "[a]ny" suggests otherwise.

4. Ideal's resort (at 19-21) to legislative history also fails. This Court has "repeatedly held [that] the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v.*

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[7] In *Scheidler v. NOW*, 126 S. Ct. 1264, 1274 (2006), this Court recently remanded the cases for entry of judgment for the defendants.

[8] Notably, the indirect plaintiff in that case, the National Organization for Women, did not bring a civil RICO claim. *See NOW*, 510 U.S. at 255. NOW's injury, presumably, would have been more remote, and (like Ideal) it could not have pleaded proximate causation.

Allapattah Servs., Inc., 125 S. Ct. 2611, 2626 (2005); *see Holmes*, 503 U.S. at 269 n.15 (RICO's legislative history is "background noise drowned out by the statutory language").

Dispositively, Ideal identifies no ambiguity in § 1964(c)'s language. That is unsurprising, considering that the relevant interpretive question was definitively resolved by this Court in *Holmes* when it held that, for a plaintiff to allege an injury "by reason of" a RICO violation, it must plead that the violation was both a cause in fact and a proximate cause of the claimed injury. *See* 503 U.S. at 265-68. By establishing that proximate cause for civil RICO requires a "direct relation between the injury asserted and the injurious conduct alleged," *id.* at 268, this Court set forth the governing legal standard.

In any event, Ideal's snippets from the legislative record reflect nothing more than bromides about RICO's primary purpose of defeating "organized crime" and "racketeer businessm[e]n." Resp. Br. 19-21 & nn.14, 16. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245 (1989) ("Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters"; "[o]rganized crime was without a doubt Congress' major target"). Nothing in those vague quotations indicates that Congress enacted RICO to create actions such as Ideal's.

Nor is Ideal aided by an isolated statement from a sole legislator that a predecessor to the bill that became RICO would have "'create[d] civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman.'" Resp. Br. 20 & n.16 (quoting 115 Cong. Rec. 6993 (1969) (Sen. Hruska)). Notably, that bill did not include mail or wire fraud as a predicate act. *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context*, 58 Notre Dame L. Rev. 237, 261 n.66 (1982).[*] Thus, Senator

[*] Also unhelpful to Ideal is the observation of a Presidential Commission that "organized crime" "'employs illegitimate methods'" like "'tax evasion'" "'to extract illegal profits *from the public*.'" Resp. Br. 19 n.11 (quoting President's Commission on Law Enforcement and Administra-

Hruska's statement says nothing about what Congress might have intended for misrepresentation-based civil RICO claims.[10] Ideal's failure to cite any legislative history endorsing a civil recovery in circumstances analogous to those of this case belies its remarkable claim (at 20-21) that "Ideal represents the kind of business Congress intended to protect" when it enacted RICO.

5. Ideal (at 21) and its amicus (at 6-7) invoke a familiar refuge: RICO's "liberal construction" clause, *see* Pub. L. No. 91-452, Tit. IX, § 904(a), 84 Stat. 922, 947. But that clause does not help Ideal for the same reason that RICO's legislative history is irrelevant – there is no statutory ambiguity to resolve here. *See Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993) (the clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one") (internal quotation marks omitted). This case involves only the proper application of *Holmes*' proximate-cause requirement.

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tion of Justice, *The Challenge of Crime in a Free Society* 187 (1967)) (emphasis added). Ideal does not dispute that the New York taxing authorities could vindicate public interests by enforcing any law that has been broken here, and nothing in the quotation contemplates a private civil action in favor of a third party to the tax evasion.

[10] Elsewhere, Senators offered examples of conduct they sought to redress. *See* 116 Cong. Rec. 602 (1970) (Sen. Hruska) (organized crime "employs *physical brutality, fear and corruption* to intimidate competitors and customers to achieve increased sales and profits") (emphasis added); *see also id.* at 607 (Sen. Byrd) (endorsing RICO and lamenting an instance in which a racketeer gained control of a detergent company and then used arson and murder to coerce another firm to buy the company's detergent). This case does not require the Court to determine how the directness requirement of *Holmes* would apply when a plaintiff claims harm resulting from predicate acts other than misrepresentation in violation of the mail and wire fraud statutes – *e.g.*, acts of violence (*see* Resp. Br. 34 n.25; Amicus Br. 5, 19-20), bribery (*see* Amicus Br. 11), extortion (*see* Resp. Br. 12 & n.31), or employing undocumented aliens (*see id.* at 35-36). *See Holmes*, 503 U.S. at 272 n.20 (declining to announce a "black-letter rule that will dictate the result in every case") (internal quotation marks omitted); *id.* at 288 (Scalia, J., concurring in the judgment) (it is "obvious that the proximate-cause test . . . that will be applied to the various causes of action created by 18 U.S.C. § 1964 [is] not uniform, but var[ies] according to the nature of the criminal offenses upon which those causes of action are based").

Moreover, in *Holmes*, this Court explained that there was nothing illiberal in interpreting the statute to authorize recovery only by directly injured plaintiffs. The result is not "that RICO cannot serve to right the [defendant's] wrongs," 503 U.S. at 274, but merely that indirectly injured persons are limited to traditional remedies under state law and cannot seek treble damages and attorneys' fees under federal law. Here, too, if National in fact violated the law, New York is fully capable of righting that wrong, and Ideal still has resort to its breach of contract claim even without its fanciful RICO theory.

The *Holmes* Court also cautioned against any purported liberal construction that would force the federal judiciary to undertake the arduous task of adjudicating claims of the indirectly injured: "RICO's remedial purposes would more probably be hobbled than helped by [such a] version of liberal construction" because "[a]llowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'" *Id.* (quoting *Associated Gen. Contractors*, 459 U.S. at 545) (third through sixth alterations in original).[11]

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[11] Ideal repeatedly references (at 9, 14, 25) material that was not before the district court when it granted National's motion to dismiss and therefore cannot be considered here. *See, e.g., Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851). In any event, Ideal does not tell the full story. National is cooperating with an audit by the New York sales tax authorities. *See* Docket Entry No. 45, No. 02 Civ. 4788 (S.D.N.Y.) (Endorsed Letter from Marshall Beil to Judge Richard M. Berman (Mar. 28, 2005)). Further, evidence from discovery casts doubt on Ideal's causation theory: Ideal and National were not the only players in the relevant market, *see id.*, Docket Entry No. 83 (Giacomo Brancato Dep. 70-72 (Jan. 4, 2005), attached as Exhibit 4 to Declaration of Marshall Beil in Support of Opposition to Summary Judgment Motion (filed Oct. 24, 2005)); and the quality of National's product exceeded that of Ideal's, *see id.*, Docket Entry No. 7 (Declaration of Richard L. Huffman in Support of Motion To Dismiss, Exhs. A (¶¶ 40, 41, 44, 51, 52), B (¶¶ 7, 8, 11, 22, 24, 44, 52), C (¶¶ 16, 17) (filed Oct. 21, 2002)). Discovery has produced no direct evidence that any individual customer switched from Ideal to National to obtain a lower price on a cash transaction.

II. IN A MISREPRESENTATION-BASED RICO SUIT, A PLAINTIFF MUST SHOW THAT IT RELIED

This Court looks to the common law in fashioning the contours of the RICO private action. *See, e.g., Beck v. Prupis*, 529 U.S. 494 (2000); *Holmes*, 503 U.S. at 268; *see also* Pet. Br. 25-27. At common law, intentional misrepresentations causing economic harm were generally actionable under the tort of deceit. *See Prosser & Keeton on Torts* at 725-29. That tort required the plaintiff to prove its own reliance on the defendant's misrepresentation. *See id.* at 728. Thus, consistent with this Court's instruction to follow the common law, nearly every circuit to have considered the question has concluded that civil RICO plaintiffs seeking to recover for harm caused by misrepresentations must establish the element of reliance. *See* Pet. Br. 29-30.

Nevertheless, Ideal contends (at 30-32) that no showing of reliance *by anyone* should be required because the government need not prove reliance in criminal cases. But reliance is not required in criminal cases because the government can prosecute inchoate frauds. *See Neder v. United States*, 527 U.S. 1, 25 (1999). When a private plaintiff seeks to recover damages under § 1964(c), however, it must prove injury resulting from the defendant's conduct, and that requires proof of reliance. *See* Pet. Br. 27-29.

Ideal also argues (at 43-45) that reliance by a third party should suffice because sporadic decisions have allowed recovery in such circumstances. Dispositively, however, the sources to which this Court looks in determining the content of the common law – respected treatises and the Restatement, *see, e.g., Field v. Mans*, 516 U.S. 59, 70 & n.9 (1995) – uniformly confirm that a plaintiff seeking damages for harm caused by an intentional misrepresentation must prove its own reliance on that misrepresentation. *See Prosser & Keeton on Torts* at 728; *Restatement (First) of Torts* §§ 525,

537, 546 (1938); *Restatement (Second) of Torts* §§ 525, 537(a), 546; *see also* Pet. Br. 31-32 & n.8.[12]

Finally, Ideal's assertion (at 32-42) that reliance is merely a way to establish causation cannot be squared with *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005).[13] There, this Court reiterated that the implied right of action under § 10(b), which "resembles" the "common-law tort actions for deceit and misrepresentation," requires proof of *both* "loss causation" *and* "reliance" or "transaction causation." *Id.* at 1631; *see id.* at 1632 ("The common law of deceit subjects a person who 'fraudulently' makes a 'misrepresentation' to liability 'for pecuniary loss caused' to one who

[12] The six cases cited by Ideal (at 43-45) that were decided before civil RICO was enacted are off-point: one was cited in our opening brief (at 33 n.9) as an example where the plaintiff relied on misrepresentations communicated to it by a third party, *see Eaton, Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 33-34 (1880); one did not involve third-party reliance at all in that the plaintiff relied on misrepresentations that the defendants made to the market at large, *see Bruff v. Mali*, 36 N.Y. 200, 204-05 (1867); three fall under exceptions referenced in our opening brief (at 34) involving cases in which the parent relied on behalf of the child, *see Piper v. Hoard*, 107 N.Y. 73 (1887), and cases in which the defendant deceived a neutral arbitrator, *see Rosenbluth v. Sackadorf*, 76 N.Y.S.2d 447 (Sup. Ct. 1947), *rev'd*, 79 N.Y.S.2d 524 (App. Div.), *aff'd*, 298 N.Y. 761 (1948); *Cooper v. Weissblatt*, 277 N.Y.S. 709 (App. Term 1935). And *Rice v. Manley*, 66 N.Y. 82 (1876), was decided before the common law allowed recovery for tortious interference with a contract for the sale of goods. *See Hornstein v. Podwitz*, 254 N.Y. 443, 447 (1930) (tortious-interference doctrine confined to contracts for personal services until 1893).

[13] Ideal relies heavily (at 33-34) on an amicus brief filed by the Solicitor General in *Bank of China v. NBM LLC*, *cert. dismissed*, 126 S. Ct. 675 (2005) (No. 03-1559). The Solicitor General did not endorse the view that "the common law consistently recognized the doctrine of third-party reliance." Resp. Br. 34 n.24. Rather, that brief explained that "reliance on the defendant's deception *by the plaintiff himself* was an essential element of a common law fraud cause of action." U.S. Br. at 21.

Additionally, Ideal selectively quotes (at 32) *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004). Rather than indicating that reliance was sometimes unnecessary, that case merely noted that it did not reach the question of whether reliance was required in every case. *See id.* at 666 ("it is neither necessary nor prudent to reach the issue of whether reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud").

justifiably relies upon that misrepresentation.") (quoting *Restatement (Second) of Torts* § 525). The Court defined "loss causation" as "a causal connection between the material misrepresentation and the loss." *Id.* at 1631; *see Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (Posner, J.) ("'Loss causation' is an exotic name . . . for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains."). Thus, even if a plaintiff establishes that its loss was caused by the defendant's misrepresentation, it *still* must prove reliance to recover. *See Dura Pharms.*, 125 S. Ct. at 1632 ("[T]he common law has long insisted that a plaintiff in [an action for deceit] show not only that had he known the truth he would not have acted but also that he suffered actual economic loss.").[11]

III. UPHOLDING SUITS LIKE THIS ONE WOULD INAPPROPRIATELY EXPAND RICO LIABILITY

The far-reaching consequences of Ideal's position can be illustrated easily. In 2004, the Internal Revenue Service assessed 355,477 net civil penalties for underpayment of excise tax, 555,193 net civil penalties for faulty corporate income tax returns, and 6,361,649 net civil penalties for

[11] This case does not require the Court to determine whether a consumer can state a claim based on a company's misrepresentation to a regulator that enables the firm to inflict harm on the consumer. *See Holmes*, 503 U.S. at 272 n.19 (citing *Taffet v. Southern Co.*, 930 F.2d 847, 856-57 (1991), *vacated*, 958 F.2d 1514, *on reh'g en banc*, 967 F.2d 1483 (11th Cir. 1992); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2d Cir. 1990)). The misstatements in such cases are not intended to deprive the regulatory bodies of money or property, *see Cleveland*, 531 U.S. at 18-19, or honest services, *see* 18 U.S.C. § 1346. Rather, to the extent that the regulators rely on the defendants' misrepresentations, they act on behalf of the customers, who bear the brunt of the misconduct in the form of excessive prices. *See County of Suffolk v. Long Island Lighting Co.*, 685 F. Supp. 38, 39 (E.D.N.Y. 1988); *see also* Pet. Br. 34 (recognizing agency exception to requirement of reliance by the plaintiff). Here, New York was allegedly defrauded and, as the directly injured party, is thus positioned to vindicate the law. New York was in no sense acting as Ideal's agent in satisfaction of the reliance requirement.

problems relating to employment taxes filed with the IRS. *See* U.S. Dep't of the Treasury, *Internal Revenue Service Data Book 2004*, at 45, Table 27 (2005). Under Ideal's theory, each one of those actions (which could easily be pleaded as mail or wire fraud violations) would provide the basis for a treble-damages suit by a competitor, and that suit would be immune from a motion to dismiss so long as the competitor labeled itself the "target" of the defendant's conduct.[15] Moreover, as evidenced by this case, a competitor would not need to wait for the IRS to take any action – it could simply allege noncompliance and proceed with its civil RICO suit. And the odds of there being tax noncompliance would be good; in a recent empirical study, 55 percent of the corporate tax returns reviewed appeared deficient. *See* Michelle Hanlon, *et al.*, *An Empirical Examination of Corporate Tax Noncompliance* 10, 36, Table 3 (June 24, 2005) (rev'd draft). Given the attenuated damages claims in such civil RICO cases and the existence of a directly injured entity, the Court should not expose businesses to the enormous burdens of defending such suits.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the district court's judgment dismissing the complaint.

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[15] Ideal's data from the Administrative Office of the United States Courts understates the number of RICO filings because it is derived from a form that permits a plaintiff to select only one "nature of suit" label to describe its case. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1286 & n.37 (2005). And the impact of civil RICO on the federal courts cannot be measured simply by the number of suits filed. A recent study showed that civil RICO cases had the third highest case weight – which measures "the judicial work required by cases of different types" – behind only death-penalty habeas corpus actions and environmental suits. *See* Patricia Lombard & Carol Krafka, *2003-2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* 1, 4-5 (Fed. Judicial Ctr. 2005).

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JOSEPH ANZA, ET AL.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Must a civil RICO claim based on mail or wire fraud allege reliance on the fraudulent misrepresentations or concealments?

2. If the answer to the first question is in the affirmative, must the plaintiff allege its own reliance, as opposed to reliance by a third party?

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy, and transacting business throughout the United States as well as in many countries around the world.

One of the Chamber's central functions is to represent its members' interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO").[1]

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. At the same time, there are those who may misuse the statute against businesses and other organizations, in large part because of civil RICO's treble damages provisions. The Court of Appeals' holding in this case, that a plaintiff alleging injury "by reason of" fraudulent conduct need not prove its own reliance on such conduct, extends the RICO statute beyond its intended breadth. Reversing that decision would provide an important check against misuse of the civil RICO statute – a check that is consistent with Congress' evident purpose and with this Court's precedents – while allowing recovery by those the statute is designed to protect. Accordingly, the

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[1] Letters of consent from the parties have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* and its members made a monetary contribution to its preparation.

Chamber and its members have a strong interest in encouraging the Court to reverse the decision below.

STATEMENT OF THE CASE

This case involves a civil RICO claim brought by respondent, Ideal Steel Supply Corp. ("respondent" or "Ideal"), based on the federal mail and wire fraud statutes. Ideal purchases steel mill products from manufacturers and sells those products and related hardware to professional ironworkers, small steel fabricators and homeowners. Ideal's only substantial competitor is National Steel Supply, Inc. ("National"), owned by Joseph and Vincent Anza (collectively, "petitioners"). *Ideal Steel Supply Corp.* v. *Anza*, 373 F.3d 251, 254-55 (2d Cir. 2004).

Ideal alleged, among other things, that National and its owners engaged in a scheme in violation of the civil RICO statute, 18 U.S.C. § 1964(c). The alleged scheme involved failing to charge sales taxes to certain customers residing in New York State ("State"), then submitting false tax reports to the State by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. According to Ideal, National's "cash, no tax" sales, along with the fraudulent sales tax reports, were intended to, and did, injure Ideal's business. *Id.* at 255. Specifically, Ideal alleged that it lost profits because "its own list prices were, on average, no higher than those of National and that but for [National's] 'cash, no tax' scheme, National would have had no competitively significant price advantage over Ideal." *Id.*

Petitioners moved to dismiss on the ground that respondent did not, and cannot, satisfy the reliance element of a civil RICO claim based on mail or wire fraud. Petitioners argued that, consistent with RICO's proximate cause requirement, the reliance element required respondent to allege and prove its own reliance on the purported misrepresentations. In response, respondent argued that it satisfied the requisite pleading elements merely by alleging

third-party reliance on petitioners' alleged fraudulent misrepresentations and that these misrepresentations proximately caused harm to Ideal. The district court agreed with petitioners that a plaintiff must show that it actually relied on the alleged misrepresentations, and thus dismissed the complaint. *Ideal Steel Supply Corp.* v. *Anza*, 254 F. Supp. 2d 464, 468-69 (S.D.N.Y. 2003).

The U.S. Court of Appeals for the Second Circuit reversed. It held "that a RICO claim based on mail [or wire] fraud may be proven where the misrepresentations were relied on by a third person [here, the State], rather than by the plaintiff" so long as there is "a causal connection between the prohibited conduct and plaintiff's injury." *Ideal Steel Supply Corp.*, 373 F.3d at 262 (citation omitted). The Court of Appeals further held that respondent sufficiently alleged that it suffered lost profits that were proximately caused by a RICO violation. *Id.* at 263. The Court therefore held that respondent could bring suit for treble damages under RICO despite its failure to allege that it relied on the alleged misrepresentations at issue. *Id.*

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that a plaintiff asserting a civil RICO violation based on mail or wire fraud need not allege or establish that the plaintiff was proximately caused by its own reliance on fraudulent behavior.

I. As a preliminary matter, this Court should resolve a fundamental circuit conflict as to whether a civil RICO claim based on mail or wire fraud requires proof of *any* reliance on the alleged fraudulent misrepresentations or concealments – *i.e.*, reliance by *someone* on the fraudulent behavior. Although RICO and the mail and wire fraud statutes do not use the term "reliance," that element of common-law fraud is necessarily incorporated into the statute under "the rule that Congress intends to incorporate the well-settled meaning of

the common-law terms it uses," including the term "fraud." *Neder* v. *United States*, 527 U.S. 1, 23 (1999). By the time the civil RICO statute was enacted in 1970, reliance was a "well-settled" - indeed, a fundamental - element of a private civil action for fraud. It also was (and still is) a necessary element of the proximate cause showing that this Court has held is required in a civil RICO action. *See Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Consequently, the element of reliance is properly incorporated into civil RICO claims based on mail fraud or wire fraud.

The Court should also hold that this reliance element requires a specific showing of reliance *by the plaintiff* rather than a third party. This is how courts interpreted the reliance element of common-law fraud at the time RICO was enacted. Under the "common-law meaning rule," this settled understanding of fraud is presumed to have been incorporated into civil RICO claims based on mail or wire fraud absent statutory text or structure to the contrary. *See Neder*, 527 U.S. at 23 & n.7. There is no statutory text or structure in the RICO, mail fraud or wire fraud statutes to rebut this presumption.

II. Public policy also supports the recognition of a "plaintiff-reliance" element in civil RICO claims based on mail or wire fraud.

First, recognizing such an element would help limit civil RICO claims to direct victims of the alleged violations. This Court recognized in *Holmes* that, as a matter of policy, treble-damage recovery under RICO should be reserved for those who can show that they were *directly* injured by a violation. *Holmes*, 503 U.S. at 268. Plaintiffs who allege injury based on fraudulent behavior relied on by a third party necessarily allege an injury that flowed only indirectly (at best) from the fraud. As explained in *Holmes*, such claims for indirect injury should be barred, in part, because they create unduly

complicated inquiries about the impact of other causes and the proper apportionment of damages among multiple victims. *Id.* at 269.

Second, recognizing a plaintiff-reliance element would prevent plaintiffs from transforming ordinary business tort claims into complex RICO claims in an effort to obtain treble damages and attorney's fees. There is no basis to conclude that Congress contemplated such a result.

Third, recognizing a plaintiff-reliance element would prevent RICO from becoming a source of additional *qui tam*-type, private-attorney-general litigation. Here again, there is no basis to conclude that Congress intended to authorize the kind of claim at issue here, which amounts to a private attorney general suit based on the alleged submission of false documents to a governmental body.

Finally, recognizing a plaintiff-reliance element would deter many plaintiffs (or potential plaintiffs) who did not actually rely on alleged fraudulent behavior - and therefore have at best a weak case on causation - from filing a civil RICO claim based on fraud. And such an element would allow courts to weed out weak fraud-based RICO claims on motions to dismiss or for summary judgment.

ARGUMENT

RICO is a comprehensive statutory scheme that authorizes civil suits based on a pattern of racketeering activity, which is broadly defined to include more than 100 predicate acts. 18 U.S.C. § 1961(1). To recover treble damages under the civil RICO statute, a plaintiff must prove that he was "injured in his business or property *by reason of*" a violation of RICO's prohibitions against racketeering activity. 18 U.S.C. § 1964(c) (emphasis added). In *Holmes* v. *Securities Investor Protection Corporation*, 503 U.S. 258 (1992), this Court construed the phrase "by reason of" in § 1964(c) to require a showing "that

the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* at 268.

As *Holmes* explained, the concept of "proximate cause" is a "judicial tool[] used to limit a person's responsibility for the consequences of that person's own acts." *Id.* "Justice demands" such a limitation in this context because "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269 (citation omitted). Moreover, allowing plaintiffs to recover damages when they suffered only indirect harm "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.*

For these reasons, this Court held that a plaintiff cannot recover treble damages under RICO merely by showing that "the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Id.* at 265-66 (footnote omitted). Instead, the plaintiff must prove "some *direct* relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (emphasis added). As we now show, this proximate cause element requires a showing that the plaintiff himself relied upon the alleged fraud.

I. Under The "Common-Law Meaning" Rule, The RICO Statute Requires Proof Of Plaintiff-Reliance When A Civil RICO Claim Is Based On Mail Or Wire Fraud.

In the decision below, the Court of Appeals implied, but did not expressly hold, that the proximate cause element required by *Holmes* requires a showing of reliance by at least someone in the causal chain when a civil RICO claim is based

on mail or wire fraud. *See Ideal Steel Supply Corp.*, 373 F.3d at 262-64 (discussing State's reliance on alleged false tax reports). This is consistent with Second Circuit precedent holding that reliance is an element of such a claim. *See Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004), *cert. granted in part*, 125 S. Ct. 2956 (Jun. 27, 2005), *cert. dismissed*, 126 S. Ct. 675 (Nov. 15, 2005). Indeed, respondent has conceded that "[t]he federal courts have generally held . . . reliance is required" to state a RICO claim when the alleged predicate act is mail or wire fraud. Br. In Opp'n to Pet. for Writ of Certiorari ("Opp'n"), No. 04-433, at 2 (filed Oct. 29, 2004).

Nevertheless, the circuits are divided on this issue. *See* Pet. for Writ of Certiorari ("Pet. "), No. 04-433, at 6 (filed Sept. 29, 2004).[2] Accordingly, in subsection A, we explain why the Court should resolve this conflict and hold, as a preliminary matter, that the proximate cause element articulated in *Holmes* requires the plaintiff in a civil RICO suit based on mail or wire fraud to show reliance on fraudulent behavior. *See Bank of China*, 359 F.3d at 176. In subpart B, we explain that this reliance element should be understood, consistent with common-law fraud, to require a showing of reliance by the plaintiff himself.

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[2] The Second, Sixth and Eleventh Circuits have held that reliance is an element of a civil RICO claim based on mail or wire fraud. *See Bank of China*, 359 F.3d at 178; *VanDenBroaeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Sikes* v. *Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002). The First Circuit has rejected this view. *See Sys. Mgmt., Inc.* v. *Loiselle*, 303 F.3d 100, 103-04 & n.3 (1st Cir. 2002); *see also Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004) (recognizing circuit split on this issue). This conflict was to be addressed in the *Bank of China* case, but the petition for *certiorari* in that case was dismissed voluntarily by the parties.

A. The Civil RICO Statute Requires A Showing Of Reliance Whenever The Claim Is Based On Mail Or Wire Fraud.

Reliance is a necessary element of the proximate cause analysis in the civil RICO context when the claim is based on mail or wire fraud. This conclusion is compelled by the principle that Congress is presumed to incorporate the settled meanings of the common-law terms it uses.

1. This principle plainly applies when interpreting the mail and wire fraud statutes. That conclusion was established in *Neder* v. *United States*, 527 U.S. 1 (1999), which addressed whether the common-law fraud element of "materiality" should be read into the mail and wire fraud statutes. Neither statute uses the term "material," but this did not end the Court's analysis. Rather, the Court turned to the "well-established rule of construction that 'where Congress uses terms that have accumulated settled meaning under . . . the common law, a court *must* infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Id.* at 21 (quotation and citations omitted) (emphasis added).

In applying this "well-established rule of construction," the Court emphasized that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud . . . statute[], actionable 'fraud' had a well-settled meaning at common law" and that meaning "required a misrepresentation or concealment of *material* fact." *Id.* at 22; *see also id.* (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996)). In light of this common-law requirement, the Court found that it "must presume that Congress intended to incorporate materiality [into the mail and wire fraud statutes] 'unless the statute[s] otherwise dictate[.]'" *Id.* at 23 (quoting *Nationwide Mut. Ins.* v. *Darden*, 503 U.S. 318, 322 (1992)).

The Court further held that, once this presumption attaches, the party opposing it bears a heavy burden. *See id.* As the Court explained, any "rebuttal [to this presumption] can only come from the text or structure of the fraud statutes themselves." *Id.* at 23 n.7. Ultimately, the Court found that "materiality of falsehood is an element of the federal mail fraud [and] wire fraud . . . statutes" because the Government "failed to show that [the] language [of these statutes] is inconsistent with a materiality requirement." *Id.* at 25.[3]

2. This well-established rule of construction applies equally when interpreting the RICO statute. That conclusion flows from *Beck* v. *Prupis*, 529 U.S. 494 (2000), which turned to the "well-established common law of civil conspiracy" to "determine what it means to be 'injured . . . by reason of' a 'conspir[acy]'" in the civil RICO context. *Id.* at 500.[4]

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[3] As *Neder* pointed out, in criminal prosecutions brought directly under the mail and wire fraud statutes, the prosecutor needs to show only a "scheme to defraud" - not a "completed fraud," with resulting injury. *Neder*, 527 U.S. at 25. Accordingly, the Court found that Congress did not intend to incorporate the common-law fraud elements of reliance and damages into the requirements for criminal mail and wire fraud. Unlike a criminal mail or wire fraud prosecution, however, a civil RICO claim for treble damages based on mail or wire fraud *does* require a showing of injury to the plaintiff's business or property "by reasons of" - *i.e.*, proximately caused by - the predicate acts. 18 U.S.C. § 1964(c); *see also Holmes*, 503 U.S. at 268-69.

[4] *See also Pasquantino* v. *United States*, -- U.S. --, 125 S. Ct. 1766, 1774 (2005) (looking to common-law to construe wire fraud statute) (citing *Neder*, 527 U.S. at 22-23); *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (When construing the phrase "false pretenses, a false representation, or actual fraud" in the Bankruptcy Code, 11 U.S.C. § 523(a)(3)(A), the Court held that all of these "operative terms . . . carry the acquired meaning of terms of art. They are common-law terms, and . . . they imply elements that the common law has

Thus, under the common-law meaning rule applied in *Neder* and *Beck*, the absence of the term "reliance" does not end the inquiry as to whether reliance is an element of a civil RICO claim based on fraudulent misrepresentations or concealments that violate the mail or wire fraud statutes. Indeed, the absence of the term "reliance" from the RICO statute is hardly surprising given that this element applies only to a subset of civil RICO claims, *i.e.*, those predicated on fraudulent misrepresentations or concealments. Accordingly, the Court must look to the common-law elements of fraud at the time the RICO statute was enacted in 1970 to determine whether a showing of reliance is required in a civil RICO claim based on mail or wire fraud.

3. By 1970, the common-law elements of fraud – including reliance – had been settled for generations. Indeed, even before the turn of the last century, one of the "essential constituents" for a case of common law fraud was reliance.[5] Not only was inducement of the plaintiff to act (or to refrain from action) to his detriment "essential throughout the law of torts," but the common-law also required that the plaintiff "must of course have relied upon it, and believed it to be true." William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964)

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defined them to include."); *Holmes*, 503 U.S. at 268-69 (relying on the common-law concept of proximate causation to construe the phrase "by reason of" in § 1964(c)).

[5] *See Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) ("The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation, known to be such, made or authorized or caused to be made by defendant, calculated and intended to influence the action of others, which came to the knowledge of plaintiff and in reliance upon which he, in good faith acted, and thus suffered the injury of which he complains. The absence of any one of these particulars is fatal to a recovery.").

("LAW OF TORTS").[6] As the RESTATEMENT (FIRST) OF TORTS explained, the maker of a fraudulent misrepresentation would be liable only if the recipient relied on "the truth of the matter misrepresented" and the recipient's "reliance upon the misrepresentation [was] a substantial factor in determining the course of conduct which result[ed] in his loss." RESTATEMENT (FIRST) OF TORTS § 546 (1938).

When RICO was enacted, therefore, a jury was not left to devise its own definition of proximate cause in the context of common-law fraud. Rather, a jury was required to find that the plaintiff relied on the alleged fraudulent conduct and that such reliance was a substantial factor in causing – *i.e.*, a proximate cause of – the damages asserted. *Id.*

4. Thus, under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder*, 527 U.S. at 23, the Court cannot "infer from the absence of an express reference to [reliance in the RICO statute] that Congress intended to drop that element from [a civil RICO claim predicated on] the fraud statutes," *id.* To the contrary, Congress' silence on this issue in the context of a civil RICO claim must be interpreted as conveying its satisfaction with the elements of common-law fraud. As this Court held in *Beck*, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial

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[6] *See also* LAW OF TORTS, at 729 ("The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course, and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.") (footnotes omitted); *Danann Realty Corp.* v. *Harris*, 5 N.Y.2d 317, 322 (1959).

mind unless otherwise instructed. In such case, *absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.*" 529 U.S. at 500-01 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)) (emphasis added).

In short, because both the mail and wire fraud statutes require a "fraud," and because "fraud" is defined at common law to require reliance on the alleged misrepresentation or concealment, the "common-law meaning" rule requires the Court to "presume that Congress intended to incorporate" the element of reliance into a civil RICO claim for damages based mail or wire fraud. *See Neder*, 527 U.S. at 23.

B. To Satisfy This Reliance Element, The Civil RICO Plaintiff Must Allege And Prove That It, Not Some Third Party, Relied On The Alleged Fraudulent Behavior.

As indicated above, respondent does not dispute that some showing of reliance is required in a civil RICO suit based on mail or wire fraud. Opp'n at 2. Instead, based on a single recent New York case, respondent argues that "[a] general requirement for reliance is of course broad enough to include third-party reliance." *Id.* at 5. Respondent is mistaken.

1. The "common-law meaning" rule also compels the conclusion that the civil RICO statute requires a specific showing of reliance by the plaintiff ("plaintiff-reliance"), and that a showing of mere third-party reliance is legally insufficient to state a civil RICO claim based on mail or wire fraud. As the RESTATEMENT (FIRST) OF TORTS makes clear, common law fraud required a showing that *the plaintiff*, as opposed to some third party, relied on the alleged misrepresentation in a business transaction:

> The maker of a fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by *his [i.e., the plaintiff's]* reliance upon the truth of the matter misrepresented if *his* justifiable reliance upon the misrepresentation is a substantial factor in determining the course of conduct which results in his loss.

RESTATEMENT (FIRST) OF TORTS § 546 (1938) (emphasis added). Other common law treatises from the time the civil RICO statute was enacted in 1970 similarly refute respondent's theory that a plaintiff need only show third-party reliance to recover on a fraud claim. *See, e.g.*, LAW OF TORTS, at 729 ("The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, take in cases of misrepresentation the form of inducement of *the plaintiff* to act, or to refrain from acting, to his detriment.") (emphasis added); *see also id.* ("The false representation must have played a material and substantial part in leading *the plaintiff* to adopt his particular course.") (emphasis added).

New York common law as of 1970 confirmed that "the traditional elements" of fraud required a showing of plaintiff-reliance. For example, in *Escoett & Co.* v. *Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929 (N.Y. App. Div. 1969), the appellate division ordered a fraud count dismissed because the counterclaimant did "not claim that it was deceived or induced into acting to its detriment, in reliance upon representations made by the [counterclaim defendant]." *Id.* at 929. Rather, "[t]he representations of which the [counterclaimant] complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it." *Id.*; *see also Ryan Ready Mixed Concrete Corp.* v. *Coons*, 267 N.Y.S.2d 627, 629 (N.Y. App. Div.

1966).[7] Other states adopted a similar interpretation of common-law fraud at this time.[8]

Accordingly, under the common-law meaning rule, Congress is presumed to have intended to incorporate the element of plaintiff-reliance into civil RICO claims based on fraudulent misrepresentations or concealments, such as those proscribed by the mail and wire fraud statutes. *See Neder*, 527 U.S. at 23. Neither "the text [n]or structure of the fraud [and RICO] statutes themselves" can support respondent's effort to rebut this presumption and carve out an exception to the plaintiff-reliance element for certain claims by a competitor. *Id.* at 23 n.7.

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[7] Respondent asserts that New York law is to the contrary and, in support, cites *Ruffing* v. *Union Carbide Corp.*, 764 N.Y.S.2d 462, 465 (N.Y. App. Div. 2003). *See* Opp'n at 5 n.1. This assertion is misplaced. Neither *Ruffing* (decided in 2003) nor any of the cases on which it relied was decided contemporaneously with the civil RICO statute. Therefore, Congress certainly did not intend to incorporate such precedent as part of RICO. *See Neder*, 527 U.S. at 22 (looking to state of law at time of statutes' enactments to discern common-law meaning of statutory terms).

[8] *See, e.g., Schock* v. *Jacka*, 460 P.2d 185, 188 (Ariz. 1969) ("requiring reliance [on the fraud] by plaintiff to his damage"); *Piedmont Trust Bank* v. *Aetna Cas. & Sur. Co.*, 171 S.E.2d 264, 267 (Va. 1969) (holding that "one who seeks to hold another in fraud must clearly show that he relied upon the acts and statements of the other"); *First Credit Corp.* v. *Behrend*, 172 N.W.2d 668, 671-72 (Wisc. 1969) ("[I]n any fraud case, in order to secure relief, the complaining party must honestly confide in the representations or, as has been said, must reasonably believe them to be true."); *State Farm Mut. Auto. Ins. Co.* v. *Wall*, 92 N.J. Super. 92, 97-98 (1966) (holding that plaintiff must show "reliance upon the truth of the representations . . . to warrant recovery of damages in an action for fraud and deceit.").

2. Finally, respondent can find no support for its position in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), which was cited by the Court of Appeals. In *Sedima*, this Court merely held that a civil RICO plaintiff is not limited to redress of a "racketeering injury" but, rather, may recover damages caused by the predicate acts themselves. *Id.* at 495-97. Quoting the dissent in that case, the Court of Appeals cited *Sedima* for the unremarkable proposition that the civil RICO statute was designed to benefit a defendant's competitors "who could '*plead and prove* that they suffered . . . injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity.'" *Ideal Steel Supply Corp.*, 373 F.3d at 260 (quoting *Sedima*, 473 U.S. at 519-20) (Marshall, J., dissenting)) (emphasis added). Putting aside the fact that this quotation is lifted from the dissent, the statement is not inconsistent with a requirement of plaintiff-reliance.

Moreover, the majority in *Sedima* clearly held that competitors who choose to sue under RICO must plead and prove damages that "flow from the commission of the predicate acts." *Sedima*, 473 U.S. at 497. This holding is entirely consistent with petitioners' view that, when the RICO predicate acts are mail or wire fraud, the competitor must plead and prove, consistent with the common-law fraud elements, that it actually relied on the alleged fraudulent misrepresentations or concealments. *Sedima* thus adds nothing to this inquiry.

II. Public Policy Dictates That Civil RICO Claims Based On Mail Or Wire Fraud Satisfy The Element Of Plaintiff-Reliance.

Public policy considerations also strongly favor petitioners' position that civil RICO claims based on mail or wire fraud require a showing of plaintiff-reliance.

A. Adopting The Common-Law Element Of Plaintiff-Reliance Would Help Curb "Massive And Complex Damages Litigation" By Plaintiffs Harmed Only Indirectly By A RICO Violation.

Such a rule is necessary, for example, to ensure that only those *directly* harmed by RICO violations are able to recover under the statute. In *Holmes*, this Court pointed to a serious "fear," grounded in public policy, that "[a]llowing [civil RICO] suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burden the courts, but [would] also undermine the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Assoc. Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 545 (1983)); *see also Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985) (noting that three dissenting members of Congress "feared the treble-damages provision would be used for malicious harassment of business competitors"). In particular, this Court found that allowing indirectly injured plaintiffs to sue under RICO would force courts to grapple unnecessarily with two problems: (1) difficulties in "ascertain[ing] the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"; and (2) complications in "apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes*, 503 U.S. at 269

(citation omitted). Both of these problems are presented in this case.

First, respondent's allegations, and similar claims, raise complex questions about the amount of damages "attributable to the violation." *Holmes*, 503 U.S. at 269. Respondent alleges that it lost customers, and thus profits, because petitioners did not charge these customers sales tax and submitted false tax reports to the State. *Ideal Steel Supply Corp.*, 373 F.3d at 254-55. But the mere submission of false tax reports to the State, and the State's reliance on those reports, obviously did not itself cause any customer to choose one competitor over the other. Rather, the alleged harm is based on speculation that, but for the alleged fraud, customers themselves would have chosen to purchase steel products from respondent instead of from petitioners. *Id.* at 255.

As predicted in *Holmes*, it would be very difficult to ascertain the amount of respondent's (or a similarly-situated plaintiff's) lost profits attributable to the alleged RICO violation as opposed to ordinary and independent business factors. *Holmes*, 503 U.S. at 269. Customers may have chosen petitioners' products over respondent's products for reasons wholly independent of the alleged "cash, no tax" practice. For example, these customers may have preferred petitioners' service, the location of petitioners' business, or the products offered by petitioners. In fact, some of these customers may not even have been aware that they were not being charged sales tax. And respondent's sales may have waned because of poor marketing or other business decisions unrelated to the alleged fraud.

The *Holmes* Court suggested that such "massive and complex damages litigation" issues be eliminated from RICO litigation by incorporating a strict proximate cause requirement into all RICO claims. *Holmes*, 503 U.S. at 274.

This Court should reaffirm that policy by expressly incorporating the common-law element of plaintiff-reliance into civil RICO claims based on mail or wire fraud.

Second, respondent's allegations, and similar claims, create a serious risk of "multiple recoveries." *Holmes*, 503 U.S. at 269. Any recovery by respondent here would not prevent the direct victim (here, the State) from seeking additional relief, thus resulting in the potential for multiple, non-overlapping recoveries. Specifically, the State arguably could pursue its own RICO claim against petitioners even if petitioner were ordered to pay respondent treble damages in this lawsuit. Such a result could subject petitioners to not one, but two, treble damages awards. *Cf. Carter* v. *Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (noting that RICO allows for "allows for treble, not sextuple damages").

Moreover, under respondent's interpretation of the civil RICO statute, if National Steel had five competitors instead of only one, there would be six viable civil RICO lawsuits (including a potential action by the State). There is no reason to believe that Congress intended RICO to authorize such multiple recoveries. To the contrary, this is the precise kind of situation that the Court hoped to avoid in *Holmes*. *See Holmes*, 503 U.S. at 269.

As *Holmes* recognized, the litigation difficulties that would arise if indirectly injured plaintiffs were allowed to sue under RICO are not counterbalanced by any legitimate public policy benefits. As the Court explained there, "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70.

In short, requiring a plaintiff to show that it and not some third party actually relied upon the alleged fraud will further the sound public policy of avoiding undue burdens on the courts while maintaining "the effectiveness of treble-damages suits.'" *Id.* at 274.

B. Adopting The Common-Law Element Of Plaintiff-Reliance Would Prevent Plaintiffs From Transforming Ordinary Business Tort And Contract Claims Into Complex RICO Claims.

Adopting respondent's interpretation of the civil RICO statute would also vastly multiply the number of RICO claims alleged in ordinary business litigation. Under respondent's broad interpretation of RICO, many ordinary business claims - such as claims for unfair competition, antitrust violations, Lanham Act violations, product liability, misappropriation of trade secrets and accountant liability, to name just a few - also would support a civil RICO claim based on mail or wire fraud so long as a third party relied on the alleged fraudulent behavior and there is some arguable nexus between that behavior and the alleged damages. Such a reading of RICO, if adopted by this Court, would expand the pool of potential RICO plaintiffs and lawsuits, overcomplicate business litigation, and significantly expand the business community's potential liabilities under the statute.

Lower federal courts have already recognized these problems and have sought to preempt them. For example, the Seventh Circuit has held that a civil RICO claim based on mail fraud "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250,

1258 (7th Cir. 1995). Similarly, the Sixth Circuit has held that civil RICO claims should not be broadly construed to supplant other civil claims: "Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim [based on fraud] absent evidence that the defendant made representations to the victim." *Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993).

These holdings make sense as a matter of policy because they help prevent plaintiffs from transforming routine business litigation into complex RICO actions.

C. Adopting The Common-Law Element Of Plaintiff-Reliance Would Prevent RICO From Becoming A General-Purpose Private Attorney General Statute.

The potential for increased RICO litigation is especially apparent in this case, in which the respondent is essentially bringing a private attorney general suit based on the alleged submissions of false documents to the State. Absent a plaintiff-reliance requirement, virtually anyone who believes he has been indirectly injured by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct. And that possibility would likely transform RICO into a general-purpose private attorney general or *qui tam*-type statute.

There is no evidence, however, that Congress intended RICO to be read so broadly as to authorize actions similar to those authorized under the False Claims Act. In contrast to RICO, the False Claims Act *expressly* provides that private individuals are permitted, under certain circumstances, to bring actions against persons who have made false or fraudulent claims for payment to the United States. *See* 31 U.S.C. §§ 3729-30. No provision of the civil RICO statute

authorizes such a cause of action, nor should such a provision be read into RICO.

Requiring a plaintiff to show that it rather than a third party actually relied upon the alleged fraud will prevent RICO from becoming a general-purpose private attorney general statute by which private plaintiffs can sue businesses based upon alleged frauds directed at governmental bodies. Such a requirement ensures that such claims, if asserted at all, are asserted by the injured governmental body.

D. Adopting The Common-Law Element Of Plaintiff-Reliance Would Discourage The Filing Of, And Facilitate The Dismissals Of, Frivolous Civil RICO Claims.

Finally, requiring a showing of plaintiff-reliance in civil RICO suits based on mail or wire fraud would serve to curb frivolous civil RICO suits. Such a requirement would "forc[e] courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses." Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 861 (2005).

The current state of RICO litigation demands such a distinction. Because of its attractive treble damages provision, the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 DEL. J. CORP. L. 519, 521 (2002). Since 1986, for example, nearly 1,000 civil RICO cases have been filed per year. *See* Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 2.03 at 2-41 (2005). As Chief Justice Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by

plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989).

Civil RICO claims based on mail or wire fraud are particularly subject to abuse given that "[t]he vast majority of civil RICO cases use mail, wire, or securities fraud as the predicate offense." Susan Getzendanner, *Judicial "Pruning" Of "Garden Variety Fraud" Civil Rico Cases Does Not Work: It's Time For Congress To Act*, 43 VAND. L. REV. 673, 678 (1990). Indeed, Chief Justice Rehnquist went so far as to question "[w]hether it is a good idea to have a civil counterpart for wire fraud and mail fraud" at all, given that, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud - which applies to all telephone calls - have a much wider sweep now than they did when the statutes were enacted." Rehnquist, 21 ST. MARY'S L.J. at 10.

These policy concerns militate strongly in favor of incorporating a plaintiff-reliance element into civil RICO claims based on mail or wire fraud. For one thing, a plaintiff-reliance requirement will reduce the number of plaintiffs who can assert RICO claims consistent with good-faith pleading requirements. Moreover, if a plaintiff files a civil RICO claim based on mail or wire fraud without having actually relied upon a fraudulent misrepresentation or concealment, the plaintiff-reliance requirement puts the court in a better position to dismiss, or grant summary judgment on, that claim once it becomes apparent that no reliance actually occurred.[9] In both of these ways, a plaintiff-reliance

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[9] *Compare Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming summary judgment in favor of the defendant,

requirement reduces the number of meritless civil RICO claims draining judicial resources from more pressing priorities, and creating needless litigation costs for businesses around the country.

* * * * *

In sum, respondent's attempt to have the Court abolish the common-law element of plaintiff-reliance in civil RICO suits based on mail or wire fraud runs headlong into the "common-law meaning" rule of statutory interpretation. It would also have disastrous consequences. The Court of Appeals erred in adopting respondent's arguments and thereby construing the civil RICO statute well beyond its intended breadth.

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in part, because the plaintiff had not "produced a shred of evidence" that the plaintiff "relied on any statement or omission to its detriment"); *Fla. Evergreen Foliage* v. *E.I. DuPont De Nemours & Co.*, 336 F. Supp. 2d 1239, 1279 (S.D. Fla. 2004) ("Summary judgment is also entered in DuPont's favor on Plaintiff-Growers' RICO claims, Counts VI and VII. The undisputed record shows that Plaintiff-Growers cannot prove reasonable reliance or direct injury."); *Lifschultz Fast Freight, Inc.* v. *Consol. Freightways Corp.*, 805 F. Supp. 1277, 1292 (D.S.C. 1992) (granting summary judgment in favor of the defendant because the plaintiff "presented no evidence" of detrimental reliance), *aff'd without op.* 998 F.2d 1009 (4th Cir. 1993); *with Feely* v. *Whitman Corp.*, 65 F. Supp. 2d 164, 174 (S.D.N.Y. 1999) (denying summary judgment to the defendants because "the common law requirement of justifiable reliance is not an element of wire or mail fraud under federal law").

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, and NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENT

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I. INTEREST OF AMICUS CURIAE[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization whose member law firms litigate antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, schemes to defraud, and white-collar criminal activity. In civil actions, NASCAT's members not only secure compensation for victims, but also deter wrongdoers, modify corporate behavior, and improve access by victims to justice. NASCAT's members advocate the enactment and enforcement of state and federal laws to prevent wrongful, fraudulent, and manipulative business practices. NASCAT's members are particularly interested in civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, as its members represent the victims in civil RICO actions.

II. INTRODUCTION

This case concerns the proximate cause necessary to be pled in a civil RICO case based upon violations of the federal mail and wire fraud statutes. The opinion by the

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[1] Pursuant to Rule 37 of the Rules of this Court, counsel for Amicus Curiae hereby certify that the consent of all of the parties has been obtained to the filing of this Brief. In accordance with Rule 37(6), counsel for NASCAT represent that they authored this Brief and that no counsel for either party authored this Brief, in whole or in part. No other party made a monetary contribution to the preparation or submission of this Brief.

United States Court of Appeals for the Second Circuit framed the issue in the following holding:

> The principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

Ideal Steel Supply Corp. v. Anza, et al., 373 F.2d 251, 263 (2nd Cir. 2004). The Circuit found that:

> [T]he principal intended victim of the scheme was *Ideal*, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that *Ideal*, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants for violations of 18 U.S.C. §1962(c) based on the alleged predicate acts of mail and wire fraud.

This Court has granted review to resolve an apparent split between the Circuit Courts of Appeals on this issue. This Brief by Amicus Curiae NASCAT seeks succinctly to demonstrate that RICO is a broad statute, offering civil relief to intended victims injured "by reason of" a RICO violation as determined under the principles announced in

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992), whether or not the underlying fraudulent communications were relied upon by the injured victims.

III. SUMMARY OF ARGUMENT

Petitioners would have this Court limit "scheme to defraud" in the federal mail and wire fraud statutes,[2] by requiring a "convergence"[3] between the victim to whom a perpetrator makes a misrepresentation and the victim from whom property is obtained and require reliance as a *per se* requirement for proximate cause under RICO. Their arguments threaten to preclude *all* "third-party" frauds under the mail and fraud statutes – civil *and* criminal – and sharply to curtail the class of victims who may seek appropriate relief under civil RICO, rolling back well-established current law.

The convergence rule that Petitioners propose, which finds no support in the text of the federal fraud statutes or RICO, little or no support in the common law, and no support in sound legal policy, finds only contradictory support in decisions of three circuits,[4] while the decisions

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[2] 18 U.S.C. §§ 1341, 1343. Decisions under the two statutes treat key issues identically. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

[3] The term "convergence" is sometimes used in the decisions; it is only a shorthand way of referring here to limiting "scheme to defraud" to face-to-face transactions involving perpetrators and victims where the victims rely to their detriment upon misrepresentations. *United States v. Christopher*, 142 F.3d 46, 52-53 (1st Cir. 1998), notes the issues, the use of the term, and the conflicts between the circuits.

[4] *See, e.g., Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993); *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989) (citing *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1988) ("from the

(Continued on following page)

of five[5] circuits flatly reject it. Petitioners' *per se* reliance requirement for proximate cause under RICO is unintelligible, because misrepresentation or omission under "scheme to defraud" is not required under the mail and

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victim of the deceit")); *Johnson Enterprises of Jacksonville, Ind. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998); *accord, Monterey Plaza Hotel Ltd. Partnership v. Local 483, Hotel & Restaurant Employees Union*, 215 F.3d 923, 926 (9th Cir. 2002) (RICO predicated on extortion and mail fraud dismissed under *Lew*); *contra, Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (RICO complaint upheld for injury of lost customers inflicted by competitor's fraud on third parties); *John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D.Va. 1987) (disappointed bidder sued winning bidder who obtained a contract by fraud; common law claims dismissed, because the Government, not the plaintiff relied on the misrepresentations, but RICO claims upheld, because RICO proximate cause not identical to common law proximate cause), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987).

[5] *See, e.g., United States v. Christopher*, 142 F.3d 46, 52-53 (1st Cir. 1998); *Environmental Tectonics v. W. S. Kirkpatrick, Inc., Dev. Int'l Corp., et al.*, 847 F.2d 1052, 1055 (3rd Cir. 1988), *aff'd on other grnds*, 493 U.S. 400 (1990); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001); *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir. 1983); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir. 1993); *accord, Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002) (decisions from other circuits on convergence rejected; defendant lost a reliance argument, but won a pattern argument under RICO) ("Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way. . . ."); *Atlas Pile Driving Co. and Olson Concrete Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989) (RICO fraud theory upheld, because it is broader than common law fraud); *contra, Israel Travel Advisory Servs., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (Easterbrook, J.) (mail fraud; competitor may not complain of lost customers); *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993) (Easterbrook, J.) ("only a scheme to obtain money or other property from the victim by fraud violates § 1341"); *Appletree Square I, Ltd. P'shp v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994) ("to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts.")

wire fraud statutes themselves. Nor is its analogue required for injury to be found to be caused to intended victims or competitors "by reason of" other predicate offenses under RICO (*e.g.*, murder, arson, extortion, bribery, etc.). Petitioners confuse what may be sometimes *sufficient* for what is always *necessary*. Reliance (or its absence) may in some situations establish (or not establish) the proximate cause nexus between a violation of RICO and the injury to the victim's business or property, but it is plainly not necessary in *every* situation, as the facts of this appeal amply establish and numerous lower court decisions unequivocally illustrate.

IV. ARGUMENT

A. RICO

In 1970, Congress enacted RICO, modeled on the antitrust statutes, to deal with "enterprise criminality." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (citations omitted). As in the antitrust statutes, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (antitrust). Thus, Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. 229 at 248-49 (1988). "The occasion for Congress' action was the perceived need to combat

organized crime. But Congress for cogent reasons chose to enact a more general statute." *Id.* at 248.

B. The Civil Remedy and Private Enforcement

As in the antitrust statutes, RICO creates "a private enforcement mechanism that ... deter[s] violators[;] deprives them of the fruits of their illegal actions[;] and ... provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (antitrust) (citing *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 313-14 (1978)); *accord*, *Rotella v. Wood*, 528 U.S. 549 at 558 (2000) ("'private attorneys general' dedicated to eliminating racketeering activity. ... The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering.") Congress not only created civil and criminal remedies, it deliberately instructed that the courts were not to limit the reach of RICO. Indeed, RICO makes its principle of liberal construction a matter of *express* statutory language to achieve its remedial purposes. P.L. No. 91-452, 84 Stat. 923, 947 (1970); *see also PacifiCare Health Systems, Inc. v. Brook*, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. ... [W]e stated that 'both RICO and the Clayton Act are designed *to remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees'. ... [We have also taken] note of the 'remedial function' of RICO's treble damages provision.") (emphasis in original; citations omitted). "RICO is to be read broadly." *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1984); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 (1982) (antitrust). This court has

recognized this principle repeatedly, rejecting all attempts to limit RICO by constricted readings of its provisions.

In line with Congress' explicit purpose, the causation element is simply stated. Civil RICO authorizes persons "injured" in their "business or property" *"by reason of"* RICO's "violation" to sue for appropriate redress, including equity relief and treble damages and attorneys fees. 18 U.S.C. § 1964(a)(c). A "violation" of RICO is committed if a "person," defined to include "individuals and entities," *id.* § 1961(3), under appropriate circumstances, uses the mails or wires, in the course of "any scheme to defraud." 18 U.S.C. §§ 1341, 1343, 1961(1)(B), 1962. Thus, RICO expressly envisions, as here, individual *and* corporate criminal *and* civil responsibility for "schemes to defraud." *Sedima*, 473 U.S. at 499 ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."). RICO affords to victims appropriate civil redress.

C. *Holmes* and Proximate Cause

Following RICO's antitrust parentage, in *Holmes*, this Court read "by reason of" in § 1964(c) to embody traditional notions of "proximate cause" on the issue of relative remoteness. 503 U.S. at 265-69 (citing *Associated General Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters*, 459 U.S. 519, 535 (1983) (antitrust) (AGC)). *Holmes* applied modified antitrust remoteness factors to RICO; the modification occurred because RICO does not have an "antitrust injury" analogue. *Holmes*, 503 U.S. at 259 n.15.

The Court reformulated the five *AGC* antitrust factors into a three-factor standard to fit RICO: the relative "difficult[y]" of "ascertain[ing]" the plaintiff's damage "attributable to the violation" between him and other more immediate victims, the danger that recognizing the less immediate victim's claim would require the "adopt[ion of] complicated rules apportioning damages among [claimants] . . . removed at different levels of injury . . . to obviate the risk of multiple recoveries," and the absence of a "need to grapple with the problems" because more immediate "victims . . . [could] be counted on to vindicate the law as private attorneys general. . . ." *Holmes*, 503 U.S. at 269-70 (citing *AGC*, 459 U.S. at 540-42).

Holmes did not announce a "black letter" rule that would "dictate the result in every case," but reformulated the 19th century "remoteness" rule of the common law (that turned on an analytical analysis of "direct or indirect" injury, that is, a formal "rule") into a 20th century "standard." *See* 503 U.S. at 274 n.20 ("Thus, our use of . . . 'direct' should . . . be understood as a reference to the proximate-cause enquiry . . . informed by the . . . [three factors] set out in the text. We do not necessarily use it in the same sense as courts before us have . . . ") (emphasis added). The distinction between a "rule" (drive 55 mph) and a "standard" (drive reasonably) is brought out by Professor Sunstein in *Legal Reasoning and Political Conflicts,* 106-08, 110-15, 130-35 (1993). Roscoe Pound in *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 482-83, 485-86 (1933) gives the classic formulation of the distinction.

"Labels," which substitute for reasons, merely tagging outcomes, without giving the true criteria for decision, that is, "direct or indirect", were no longer to obtain to

determine "remoteness." This Court in *AGC* specifically rejected the labels of "target" and "zone of interests," because the use of "labels [as a technique of making decisions] may lead to contradictory and inconsistent results." 459 U.S. at 537 n.33. *See also Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 586 (1937) (Cardozo, J.) ("labels . . . are subject to the dangers that lurk in metaphors . . . and must be watched . . . lest they put us off our guard"); *Techt v. Hughes*, 229 N.Y. 222, 244, 128 N.E. 185, 189 (1920) (Cardozo, J.) ("To determine whether . . . [a treaty] has . . . [a] character it is not enough to consider its . . . label. No general formula suffices. We must consult in each case the . . . purpose of the specific articles [of the treaty] involved.").

In this case the court below applied *Holmes* properly. To be sure, the Second Circuit below used "target" language in its analysis, but it used it *solely* to sum up a conclusion that it reached independent of labels, applying the *Holmes* factors.

Because "scheme to defraud" encompasses more than face-to-face transactions or misrepresentations or omissions, as noted in more detail below, a *per se* "convergence" rule and a universal requirement of reliance for proximate cause ought to be rejected by this Court. The only legally acceptable way to determine the issue of remoteness is to use the *Holmes* factors, as the Second Circuit did below, and to assess the proximate cause nexus case-by-case, using the normal tools of proximate cause. Reliance is surely *sufficient* in some cases, but it is hardly universally *necessary*, as Petitioners would have it. The element of reliance was, in fact, *not* essential to its decision; "proximate cause" was necessary and found by the Circuit. "Proximate cause" may be found in a variety of ways in a

variety of situations. *See, e.g., Basic, Inc. v. Levinson*, 479 U.S. 1083 (1987) ("There is . . . more than one way to demonstrate . . . [a] causal connection."). Far from departing from *Holmes*, the Second Circuit followed the teachings of *Holmes* and the path of a majority of the circuit courts.

D. Scheme to Defraud

"Scheme to defraud" is *not* universally limited to misrepresentation or omission fraud; it extends, for example, to a fraud worked through bribery that need not involve misrepresentations. For the leading decision on the point, *see Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("A scheme to get money unfairly by obtaining and the betraying the confidence of another, or by corrupting one who acted for another . . . would be a scheme to defraud though no lies were told."), *overruled on other grounds*, *United States v. Cruz*, 478 F.2d 408, 412 n.8 (5th Cir. 1973) (court may not review the sufficiency of the evidence in a grand jury in light of *Costello v. United States*, 350 U.S. 359 (1956)); *see, e.g., United States v. Caldwell*, 544 F.2d 691, 695 (4th Cir. 1976) (mail fraud prosecution upheld that resulted from a scheme to use bank funds to bribe state officials).

"Scheme to defraud" may involve a third-party fraud, where the fraud (*e.g.*, a misrepresentation or a bribe) victimizes one entity, say, a rate-setting commission that may or may not itself suffer a property loss, where a loss is then suffered by a third person, say, a rate-payer; a gain inures to the perpetrator, say, a utility, a result that is intended. The loss and the gain need not be identical; they need only be related; and no "convergence" is required

between the principal victim (the rate-setting commission) and the secondary victims (the rate-payers) of the fraud. This model is from *Holmes* itself, in which this Court *recognized* that a third-party fraud victim might properly establish proximate cause under the Court's remoteness teachings, 503 U.S. at 279 n.19, an aspect of *Holmes* not discussed by Petitioners.

Here, a "convergence" requirement (a misrepresentation to the victim who suffers the loss) would preclude recovery. Instead, a showing of "proximate cause" suffices and a victim can establish it by the use of this Court's general "proximate cause" standards. Third-party frauds, as here, typically involve a fraud on a governmental entity, *see, e.g., Bieter*, 987 F.2d at 1325 n.4 (bribery; zoning board); *Environmental Tectonics*, 847 F.2d at 1055 (bribery; foreign government), where it is not necessary to make misrepresentations or an omission, and "convergence" is not present, yet a violation of mail or wire fraud is committed, and RICO authorizes recovery. Accordingly, Petitioners' arguments would undermine a central purpose of RICO: control of public "corruption". *Statement of Findings and Purpose*, P.L. No. 91-452, 84 Stat. 922-23 (1970).

Under this Court's well-settled jurisprudence, "scheme to defraud" is broad, and it extends "to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). It "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter*, 484 U.S. at 27 (citations omitted). But this Court squarely teaches, and Petitioners ignore, that "scheme to defraud" *extends* beyond frauds accomplished by misrepresentations or omissions, *Grin v. Shine*, 187 U.S. 181, 189 (1902) (embezzlement), and it reaches, for example,

beyond face-to-face transactions and includes third-party frauds, *United States v. O'Hagan*, 521 U.S. 642, 649-58 (1997) (misappropriation and use of confidential information to trade on securities); *accord*, *Carpenter*, 484 U.S. at 25-29 (insider trading viewed as misappropriation).

E. The Common Law and Federal "Fraud"

Petitioners urge this Court to follow the common law, but then grossly mischaracterize it. The roots of the Petitioners' errors lie in their confusing various kinds of "fraud," a term, as Dean Prosser so ably teaches, that is "so vague that it requires definition in nearly every case." *William Prosser et al., Law of Torts*, 727 (5th ed. 1984) ("Prosser"). Petitioners erroneously equate and conflate "scheme to defraud" under federal law with common law "obtaining money by false pretenses," a crime, and common law "deceit," a tort, each of which contain misrepresentation and reliance elements with common law "cheat," a crime that required an "intent to defraud" and a false symbol or token but neither misrepresentation nor "convergence" face-to-face transactions, and "conspiracy to defraud," a crime. Decisions and treatises of the time referred to the common law action for misrepresentation, not as "fraud," but "deceit." *See, e.g., Joel Bishop, Commentaries On The Non-Contract Law*, 132-44 (1889); *Frederick Pollock, A Treatise On The Law Of Torts*, 348-88 (1894). When "fraud" alone was used, it signified a much broader range of overreaching conduct. *See, e.g., Melville Bigelow, The Law of Fraud*, 3-4 (1877); *William Anderson, A Dictionary Of Law*, 474-78 (1889).

In fact, "scheme to defraud" in federal fraud law stems from a careful statutory blend of common law "cheat" and "conspiracy to defraud."

> [M]ail fraud is the culmination of a long historical progression. Seen in the light of . . . history, the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require such loss. Common-law cheat required a token . . . [M]ail fraud does not require such a token. . . . The requirements of common law cheat could be met [without a token] by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of 'scheme.' The drafters also retained the element of 'intent to defraud' required by false pretenses. . . . Accordingly, mail fraud is best seen as a modern form of common-law cheating.

Note: Whatever Happened to Durland?: Mail Fraud, RICO, and Justifiable Reliance, 68 Notre Dame L. Rev. 333, 337-64 (1992).

Cheating, without misrepresentation, omission, "convergence," or a face-to-face transaction, now suffices under mail or wire fraud to establish a "scheme to defraud." *See, e.g., Murr Plumbing v. Scherer Bros. Fin. Serv. Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995) (RICO mail fraud); *Formax, Inc. v. Allan C. Hostert, et al.*, 841 F.2d 388, 390 (Fed. Cir. 1988) (RICO mail fraud). The mail and wire fraud "scheme" is not limited to the common law's "false pretenses" and "deceit". "Scheme to defraud" includes, in sharp contrast, making promises with an intent not to perform, *United States v. Comyns*, 248 U.S. 349, 353

(1919), and embezzlement, *Grin v. Shine*, 187 U.S. at 189. *See generally Rollin M. Perkins et al., Criminal Law*, 292-342, 351-388 (3rd ed. 1982); *Clark & Marshall, Law of Crimes* 706-780, 795-840 (6th ed. 1958) (*Melvin F. Wingersky ed.*). Mail and wire fraud forbid schemes that involve false representations and schemes to defraud that do not. *United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991). Petitioners offer no valid justification to overrule this settled body of law that has worked well to vindicate the right of victims of "schemes to defraud."[6]

F. Construing the Statutes

The traditional elements of "scheme to defraud," well-established by this Court's jurisprudence, may be simply set out. The defendant must act with "intent to defraud." *Durland v. United States*, 161 U.S. 306, 312-14 (1896). Good faith is an absolute defense. *Id.* The perpetrator must formulate a "scheme." "A scheme refers to the overall design to defraud one or many by means of a common plan

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[6] First enacted in 1872, the mail fraud statute is the progenitor of the federal fraud statutes codified in Title 18 in 1948. Congress, in fact, added wire fraud, modeled on mail fraud, as a separate crime in 1952. The phrase now appears in up to 500 federal statutes as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988) (Testimony of Acting Assistant Attorney General John C. Keeney). Thus, "scheme to defraud" is a crucial concept in federal fraud law, criminally and civilly. Moreover, "[these statutes] have been regularly enforced by executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric." *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) ("During the past century, both Congress and [this] . . . Court have repeatedly placed their stamp of approval on expansive use of the mail and wire fraud statutes.").

or technique." *United States v. Massey*, 48 F.3d 1560, 1566 (10th Cir. 1995).

"Scheme to defraud" is "sufficiently general" to reach a broad range of illicit activity. *United States v. Maze*, 414 U.S. 395, 399 n.4 (1974) (mail fraud's "scheme to defraud" applicable to a credit card scam, even though credit cards were not in existence in 1872, when it was drafted). The perpetrator must intend the result of his or her scheme, that is, he or she must intend to deprive another of something of value, or to gain a benefit for himself or herself by means of deprivation or gain. *Carpenter*, 484 U.S. at 27. "Intent . . . make[s] an otherwise innocent act criminal, if it is a step in a plot." *Badders v. United States*, 240 U.S. 391, 394 (1916) (mail fraud) (Holmes, J.). Apart from the jurisdictional elements (mail, interstate wire, etc.), "scheme to defraud" requires nothing else. A "scheme to defraud" may be implemented through a variety of techniques, including, but not limited to, misrepresentations. A comprehensive definition of "scheme to defraud" "need not be undertaken," *Fasulo*, 272 U.S. at 628, and it has not been. The classic decision declining to offer such a definition of "fraud" is *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941) (Holmes, J.) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.").

Petitioners' arguments are inconsistent with the text of the fraud statutes and modern conceptions of "fraud." Reading RICO, or any other statute, including the federal fraud statutes, is basically a question of the "language of the statute – the most reliable evidence of its intent." *United States v. Turkette*, 452 U.S. 576, 493 (1981); *see Henry Friendly, Benchmarks*, 202 (1976) ("(1) read the statute, (2) read the statute, (3) read the statute") (quoting

the three rules of Justice Frankfurter for interpreting statutes); *see also Felix Frankfurter, Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); *Roscoe Pound, III Jurisprudence*, 488-90 (1959), "specious construction [of statutes] tends to bring law in to disrespect; . . . subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws . . . worth little [and to] break down [the] legal order." *G. Robert Blakey & Kevin Roddy, Reflections on Reves v. Ernest & Young*, 33 Am. Crim. L Rev. 1345, 1460 n.441 (1996), summarizes the basic principles followed by this Court in construing RICO; they run straight and true. So, too, do the Court's later decisions, *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Cedric Kushner Pro., Ltd. v. Don King*, 533 U.S. 158 (2001); *PacifiCare Health Systems, Inc. v. Brook*, 538 U.S. 401 (2003). Petitioners offer no convincing reason to abandon these sound principles now.

The statutes (18 U.S.C. §§1341, 1343) here say "any" fraud. "Any" means "all" not "some, but not others." *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 212, 223 (1991). No convincing policy justification can be, or has been, offered to support inserting into these fraud statutes an extra-statutory-based requirement of "convergence" of the perpetrator and his or her victim, particularly in a society that is unfortunately characterized by complex, multiple-party frauds.

Petitioners' arguments are an unwise effort to return to the discredited philosophy of *caveat emptor*, where

courts externalized the costs of fraud from entrepreneurs to hapless victims in an effort to conserve scarce capital in a developing economy in the early 19th century. *See generally, Morton J. Horwitz, The Transformation of American Law: 1780-1860*, 253-66 (1977) (tracing the rise of "legal formalism," which weighted the law differently to narrow damage claims, to a "political and economic power shift . . . to merchant and entrepreneurial groups"). RICO squarely stands in the tradition of congressional legislation that rejects the philosophy of *caveat emptor*. *See, e.g., SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963) (securities statutes designed to curtail "philosophy of caveat emptor"); [*Max Radin, The Lawful Pursuit of Gain*, 54 (1931)] ("[C]aveat Emptor . . . is bad Latin, and from the Roman point of view, worse law."). That day is over. Petitioners' "convergence" rule is without a justifiable textual, common law, or statutory basis to support it.

Fundamentally, the Petitioners misunderstand *Holmes*. Factual ("but for") cause is, of course, insufficient. 503 U.S. at 265. In each instance, an examination of other considerations is required to determine the proper extent of liability. *Id.* at 266. But no "black letter rule . . . will dictate the result in every case." *Id.* at 274 n.20 (citing *AGC*, 459 U.S. at 536). "Schemes to defraud" may, of course, involve simple, face-to-face misrepresentation or omission fraud. Even so, "proximate cause" may require an analysis not only of the transaction (how did you get into the relationship?), but also of loss causation (why did you suffer the loss?). *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (1990) (RICO; while transaction and loss causation may merge, each must be shown; fraud that induces entry into oil and gas partnership establishes transaction causation, but where the fraud is unrelated to

the decline in market value, loss causation is not established) ("If the plaintiffs would have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO, they have incurred no loss for which RICO provides a remedy."). Thus, proof of "convergence" and reliance may or may not show transaction and loss causation. Compare *Metromedia Co. v. William D. Fugazy, et al.*, 983 F.2d 350, 368 (2nd Cir. 1992) (RICO; reliance in face-to-face misrepresentation fraud shows proximate cause between fraud and injury) *with Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996) (RICO; where plaintiff knew of overcharges, no proximate cause between face-to-face misrepresentation fraud and injury).

Antitrust causation is also instructive in construing RICO's causation provision. When this Court, in *AGC*, took up "proximate cause" in antitrust litigation, it specifically criticized and rejected the use of "labels" to decide remoteness questions. 459 U.S. at 528-35 & n.33 ("directness," "zone of interests," and "target"). Instead, the lower courts were to "analyze each situation in light of the factors" that the Court identified in its opinion. *Id.* In fact, RICO and antitrust overlap. *See, e.g., Environmental Tectonics*, 847 F.2d at 1067 (antitrust and RICO recovery upheld in bribery by bidder of foreign government). "Proximate cause," apart from special antitrust requirements, is the same under RICO and antitrust. *Holmes*, 503 U.S. at 269-70. Yet third-party recovery *without* "convergence" or "reliance" routinely meets the test of proximate cause in antitrust litigation. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988) (manufacturer of plastic conduit properly permitted to sue under the antitrust statutes manufacturer of steel

conduit that improperly influenced a trade association, which, in turn, promulgated a safety code that contained false product safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others). Thus, Petitioners' *per se* approach for "convergence" and "reliance" is unsupportable in light of the text of RICO and its antitrust parentage.

G. Reliance Alone

Petitioners confuse "sufficient" with "necessary." Respondent has shown a *sufficient* connection between Petitioners' violations of RICO and Respondent's injuries using traditional proximate cause tools *without* having to show reliance. In fact and in law, Respondent's competitive injuries to its business and property followed, as sunrise follows sunset, when Petitioners *intentionally* made the illegal and anti-competitive sales in the confined Bronx market, *knowing* and *intending* the consequence that their illegal and anti-competitive sales would have on the business and property of the Respondent as part of their "scheme to defraud," not merely the taxing authorities, but, most importantly, Respondent. Respondent ought to be able to try to convince a jury under the facts well-pled and amply shown on this record of the proximate relation under RICO between the illegal and anti-competitive sales of Petitioners and the sales lost by Respondent.

An argument for reliance as the *sole* means to show proximate cause under RICO would not be made before this Court, or seriously entertained if made, had Petitioners burned down Respondent's store or shot its president. Remoteness would, of course, not be an issue, but why

should "reliance" either be raised? *See Jerry Kubecka, Inc., v. Avellino*, 898 F. Supp. 963, 969 (E.D. N.Y. 1995) (corporation, but not personal estates, permitted to sue under civil RICO for economic injury to its business and property flowing from a mob hit on its president by hitmen connected to rival garbage collection companies; reliance neither raised nor considered).

H. Remoteness and RICO

Remoteness is another matter, an issue of weighing factors in choosing between victims to select the one in the "best position" to enforce *federal law, not state* law. *Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 541-45; *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990) (antitrust); *California v. ARC America Corp.*, 490 U.S. 93, 102 n.6 (1989) ("ARC") (antitrust); *see Sports Racing Serv., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889 n.15 (10th Cir. 1997) (antitrust) ("best position to identify . . . [a violation] and the most incentive to bring an action"). No plaintiff's claim should be, as here argued by Petitioners, denied under a "remoteness" analysis when the denial is "likely to leave a significant violation [of federal law] undetected or unremedied." *AGC*, 459 U.S. at 542. Petitioners complain vociferously about the overlap between RICO and state law. Nevertheless, "undetected and unremedied" is an issue of *federal* law. *See ARC*, 490 U.S. at 104-05 (antitrust; duplication under federal and state law permissible); *Turkette*, 452 U.S. at 587 n.9; P.L. No. 91-452, 84 Stat. 923, 947 (1970) (duplication under RICO and state law preserved). Members of Congress raised similar questions in the floor debates on RICO. *Turkette*, 452 U.S. at 586-87 ("In the face of these objections, Congress

nonetheless proceeded to enact the measure."). Petitioners must take their complaints to Congress, not this Court.

I. Competitive Injury

No one else can sue for Respondent's *competitive* loses under RICO but Respondent. *See Sedima*, 473 U.S. at 497 & n.15 ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts. Such damages include, but are not limited to, . . . competitive injury. . . .)." The majority and minority in *Sedima* were *unanimous* on the recovery of competitive injuries. Petitioners would have this Court turn its back on this aspect of *Sedima*. Indeed, they do not mention this aspect of *Sedima* in their arguments, as if this Court were not already aware of the *stare decisis* force of a unanimous precedent. In short, no suit by New York's taxing authorities can seek to encompass *these* losses *under* RICO. As the Second Circuit held: "*Ideal*, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims" 373 F.3d at 264.

J. Intentional Torts

Traditionally, foreseeability plays a diminished role in "proximate cause" determinations where the "tort" is, as here, intentional. *See, e.g., Restatement of Torts (Second)*, § 435, an aspect of the Restatements not mentioned by Petitioners. RICO is a "tort," *Mid Atlantic Telecom, Inc.*, 18 F.3d at 263-64, and its predicate offenses require a state of mind, met here by a showing of "intentional" conduct under circumstances where the perpetrator is virtually certain of the anti-competitive consequences of his unlawful behavior under RICO. Thus, the chain of causation for

cognizable damages under RICO properly extends further than merely negligent torts. *See, e.g., Roma Construction Co. v. Arusso*, 96 F.3d 566, 576 (1st Cir. 1996) (RICO; succumbing to Governmental extortion by victim does not break in chain of causation), *reversing*, 906 F. Supp. 78 (D.R.I. 1995) (holding that a person who pays an extortionist is the cause of his own injury). Here, the tort is both intentional and targeted at Petitioners' competitor. The Restatement does not counsel against standing.

K. *Peek* and the Petitioners

The Petitioners' *per se* preclusion of the recovery for injury suffered by a third party whose injury was an objective of the scheme, where the fraud is in part directed at another party, particularly a government agency, is a misguided effort to import a discredited 19th century *laissez faire* limitation in English law on civil "deceit" into the modern American law of "scheme to defraud." Petitioner's argument implicitly adopts the wholly discredited common law limitation imposed at the height of English *laissez faire* in *Peek v. Gurney*, L.R., 6 Eng. & In. App. 377 (1873). Lord Cairns, reflecting the narrow views of his day, held that a speaker who makes a misrepresentation is civilly liable only to the one whom he "desired" to influence (the principal listener) by the representation in the fashion that occasioned the injury; absent extraordinary circumstances, third parties were not to recover. *Peek* is criticized in *W. Page Keeton, The Ambit of Responsibility for Fraud: Representator's Liability*, 17 *Tex. L. Rev.* 1 (1938) and *Prosser* at 743-45.

A *Peek*-type limitation from English law for federal mail or wire fraud or civil RICO, is unsupported both by the language of the mail or wire fraud provisions and RICO (that affords "any person," 18 U.S.C. § 1961(3), the right to sue. *Id.* at 1964(a)), or by any justifiable grounds of public policy in a modern society. Limitations on civil "deceit" "plainly have no place" in establishing a "violation" of a "scheme to defraud." *Neder v. United States*, 527 U.S. 1, 23 (1999). Nor should they affect civil liability. *American Society of Mechanical Engineers, Inc.*, 456 U.S. at 568-69 (antitrust) ("Victorian" common law limitations inappropriate on private enforcement of antitrust statutes.).

Early American common law decisions abound that are inconsistent with *Peek*. *See, e.g.*, *Ernest F. Bohannon v. Wachovia Bk. & Trust Co.*, 210 N.C. 679, 683, 188 S.E. 390, 394 (1936) (testator deceived into disinheriting plaintiff; plaintiff has claim for relief against perpetrator); *accord Restatement of Torts (Second)*, § 774B (1979); *Mitchell v. Langley*, 143 Ga. 827, 831, 85 S.E. 1050, 1051 (1915) (holder of life insurance policy defrauded into switching beneficiary; beneficiary has claim for relief against perpetrator). Sutherland in *J.G. Sutherland, Law of Damages* at 55 (1916) (citing *Ira Gregory v. John Brooks*, 35 Conn. 437 (1868)) observed, based on his review of the American common law cases, that "where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . *unless the wrongful conduct is willful for that purpose.*" Petitioners refer to Sutherland's treatise, but do not mention the "willfulness" exception to the general remoteness rule at the American common law. History does not support the Petitioners' arguments.

L. The Floodgates Myth

Petitioners trot out the tired, old, and thoroughly refuted "opening the litigation floodgates" nightmare. It does not stand the light of day. Data, singularly missing from Petitioners' brief, refute their dire claims. Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, private plaintiffs instituted 84 percent. *United States Department of Justice, Sourcebook of Criminal Justice Statistics* 431 (1981). No one seriously suggests that civil antitrust litigation is at floodgate proportions. The number of criminal to civil RICO suits is now running at roughly the same ratio as the statutes that served as its model. *G. Robert Blakey & Thomas Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God – Is this the End of RICO,"* 43 *Vanderbilt L. Rev.* 851, 1020 (1990) (150 against 1000). Recent data indicates that criminal filings in 2005 were 69,818, of which 29 (.0004% of the total) were criminal RICO, Table D-2, *Federal Judicial Caseload Statistic* (March 31, 2005), while civil filings in 2005 were 278,712, of which 840 (.000003.5% of the total) were civil RICO, Table C-2, *id.* http://www.uscourts.gov/caseload2005/contents.htm (last visited 2-5-06). Blakey and Perry generally refute the litigation floodgate myth at 869-73.

More recent data confirms their analysis. In fact, since 1989, the date of this Court's *H. J. Inc.* "pattern" decision, the number of civil RICO filings steadily *declined*. From 1980-1996, for example, the number of civil cases filed in federal courts *increased* from 168,800 to 272,700 per year (*U.S. Census Bureau, Statistical Abstract of the United States*) (Table No. 346) (1997) at 216, but the total number of civil RICO filings *decreased* from 903 each

year to 840 from 1993 to 1997. *Id.*, Table C-2A, *Judicial Business of the United States Courts* (1997).

RICO claims for relief no longer routinely appear in commercial litigation; sophisticated litigators now use them only in systemic patterns of unlawful conduct. Where others attempt to use them improperly, a substantial minority of the filings, they are quickly dismissed. At one time, the business community shunned civil RICO, feeling that to use it would legitimate a litigation technique that in the early days of its implementation was widely claimed to be illegitimate. That day is no more. *See, e.g., Edmund L. Andres, None Prove So Stubborn as a Giant Spurned*, N.Y. Times, June 11, 1997, at C37 (reporting a Volkswagen settlement of a civil RICO case brought by General Motors against it); *Saul Hansell, Bankers Trust Settles Suit With P. & G.*, May 10, 1996, at C1 (reporting a settlement of a civil RICO suit between two major corporations over an investment fraud). Nor may a court, in any event, properly use a fear of "excessive" litigation to curtail congressional express claims for relief.

M. RICO's Role

RICO is not ambiguous, as some argue; it is broad, as Congress designed it. *Sedima*, 473 U.S. at 499 (RICO "demonstrate[s not] ambiguity[, but] breadth") (citation omitted); *Russello v. United States*, 464 U.S. 16, 21-22 (1983) ("Congress selected ... ['interest'] apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are 'enterprise' ... ; 'racketeering activity'; and 'participate'."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (antitrust) ("We must take a statute as we find

it. Congress created the treble damage remedy . . . precisely for the purpose of encouraging *private* . . . [litigation.] These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the . . . [law] and deterring violations.") (emphasis in original). Floodgates fears, even if valid, "are policy consideration more properly addressed to Congress than this Court." *Id.* at 345. But apart from the raw numbers, determining the volume of cases is pointless until the litigation is itself characterized, for, as this Court recognizes, "That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

RICO's effectiveness, criminally and civilly, as a guarantor of the integrity of the nation's marketplace, an issue sadly in the headlines every day in the context of corporate fraud, is crucial. The litany of major company names facing fraud charges in the news is dizzying. *See, e.g., The Economist*, June 28, 2003 (Special Edition) at 7 (Enron, WorldCom, Tyco, Adelphia, HealthSouth, ImClone, Global Crossing, etc.) ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed."). "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." *Carl Kaysen et al., Antitrust Policy*, 17 (1959); *accord, American Column & Lumber Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or market power"). Antitrust focuses on the third; federal "scheme to defraud" statutes focus on the second; RICO focuses on the first and second. Together, they seek

a national marketplace characterized by integrity, both fiscal and physical.

If mail fraud, wire fraud, and RICO are to be limited, as boldly attempted here by Petitioners, that unwise reform ought, if at all, to come from a fully informed Congress. *H.J. Inc.*, 492 U.S. at 249. Congress still sits; it can amend RICO if it sees fit. *See, e.g., Private Securities Litigation Reform Act of 1995*, P.L. 104-67, § 107, *amending* 18 U.S.C. § 1964(c) (conduct actionable as securities fraud may not be grounds for civil recovery under RICO).

After ample time, and in full possession of the facts, Congress has not enacted *general* limitations on mail or wire fraud or on RICO's civil enforcement of their "scheme to defraud" provisions. Indeed, Congress expanded them after this Court's restrictive decision in *McNally v. United States*, 483 U.S. 350 (1987), *set aside in* 18 U.S.C. § 1346 ("honest services" fraud restored to mail and wire fraud statutes). Absent constitutional considerations which are absent here, that ought to end the matter judicially. *Turkette*, 452 U.S. at 587 ("There is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of . . . [RICO]"). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt v. Hughes*, *supra*, 229 N.Y. 222, at 228-29. Amicus Curiae seeks no more than the enforcement of the statutes as written.

V. CONCLUSION

For these reasons, Amicus Curiae respectfully urges this Court to reject the arguments of Petitioners and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ANZA ET AL. *v.* IDEAL STEEL SUPPLY CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04–433. Argued March 27, 2006—Decided June 5, 2006

The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits certain conduct involving a "pattern of racketeering activity," 18 U. S. C. §1962, and makes a private right of action available to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions, §1964(c), provided that the alleged violation was the proximate cause of the injury, *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268. Respondent Ideal Steel Supply Corporation (Ideal) has stores in Queens and the Bronx. Petitioner National Steel Supply, Inc. (National), owned by petitioners Joseph and Vincent Anza, has stores in the same locations and is Ideal's principal competitor. Ideal filed suit in the District Court, claiming that National failed to charge New York's sales tax to cash-paying customers, allowing it to reduce its prices without affecting its profit margin; and that it submitted fraudulent state tax returns to conceal the conduct, which involved committing mail and wire fraud, both forms of "racketeering activity" under RICO. Ideal alleged that the Anzas violated §1962(c), which forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. It also claimed that all the petitioners violated §1962(a)—which makes it unlawful for a person "to use or invest" income derived from a pattern of racketeering activity in an enterprise engaged in or affecting interstate or foreign commerce—when they used funds generated by the fraudulent tax scheme to open National's Bronx location, causing Ideal to lose business and market share. The District Court granted petitioners' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Ideal had not shown reliance on petitioners' misrepresentations, as required in RICO mail and wire fraud claims. Vacating, the Second

Syllabus

Circuit held, with regard to the §1962(c) claim, that a complaint alleging a pattern of racketeering activity designed to give a defendant a competitive advantage adequately pleaded probable cause even where the scheme depended on fraudulent communications made to a third party; and held that Ideal adequately pleaded its §1962(a) claim by alleging injury resulting from petitioners' use and investment of racketeering proceeds.

Held:

1. Ideal cannot maintain its §1962(c) claim. Under *Holmes*, proximate cause for §1964(c) purposes requires "some direct relation between the injury asserted and the injurious conduct alleged." 503 U. S., at 268. The direct victim of the alleged RICO violation is the State of New York, not Ideal. Ideal's claim is too attenuated to satisfy *Holmes*' requirement of directness. This result is confirmed by the directness requirement's underlying premises, one of which is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action. Ideal claims lost sales because of National's decreased prices, but National could have lowered prices for reasons unrelated to the asserted tax fraud, and Ideal's lost sales could have resulted from other factors as well. The attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes*. Further illustrating the absence of proximate cause is the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim. A court would have to calculate the portion of National's price drop attributable to the pattern of racketeering activity and then calculate the portion of lost sales attributable to the relevant part of the price drop, but *Holmes*' proximate causation element was meant to prevent such intricate, uncertain inquiries from overrunning RICO litigation. A direct causal connection is especially warranted where the immediate victims can be expected to vindicate the laws by pursuing their own claims. Contrary to the Second Circuit's rationale, a RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. Because Ideal has not satisfied that requirement, this Court has no occasion to address the substantial question whether a plaintiff asserting a RICO claim predicated on mail or wire fraud must show that it relied on the defendant's misrepresentations. Pp. 4–9.

2. The Second Circuit's judgment with respect to Ideal's §1962(a) claim is vacated so that court can determine on remand whether petitioners' alleged §1962(a) violation proximately caused Ideal's asserted injuries. Pp. 9–10.

373 F. 3d 251, reversed in part, vacated in part, and remanded.

Syllabus

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, SOUTER, GINSBURG, and ALITO, JJ., joined, and in which THOMAS, J., joined as to Part III. SCALIA, J., filed a concurring opinion. THOMAS, J., and BREYER, J., filed opinions concurring in part and dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–433

JOSEPH ANZA, ET AL., PETITIONERS *v.* IDEAL STEEL SUPPLY CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§1961–1968 (2000 ed. and Supp. III), prohibits certain conduct involving a "pattern of racketeering activity." §1962 (2000 ed.). One of RICO's enforcement mechanisms is a private right of action, available to "[a]ny person injured in his business or property by reason of a violation" of the Act's substantive restrictions. §1964(c).

In *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992), this Court held that a plaintiff may sue under §1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff's injury. The instant case requires us to apply the principles discussed in *Holmes* to a dispute between two competing businesses.

I

Because this case arises from a motion to dismiss, we accept as true the factual allegations in the amended complaint. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993).

Respondent Ideal Steel Supply Corporation (Ideal) sells steel mill products along with related supplies and services. It operates two store locations in New York, one in Queens and the other in the Bronx. Petitioner National Steel Supply, Inc. (National), owned by petitioners Joseph and Vincent Anza, is Ideal's principal competitor. National offers a similar array of products and services, and it, too, operates one store in Queens and one in the Bronx.

Ideal sued petitioners in the United States District Court for the Southern District of New York. It claimed petitioners were engaged in an unlawful racketeering scheme aimed at "gain[ing] sales and market share at Ideal's expense." App. 7. According to Ideal, National adopted a practice of failing to charge the requisite New York sales tax to cash-paying customers, even when conducting transactions that were not exempt from sales tax under state law. This practice allowed National to reduce its prices without affecting its profit margin. Petitioners allegedly submitted fraudulent tax returns to the New York State Department of Taxation and Finance in an effort to conceal their conduct.

Ideal's amended complaint contains, as relevant here, two RICO claims. The claims assert that petitioners, by submitting the fraudulent tax returns, committed various acts of mail fraud (when they sent the returns by mail) and wire fraud (when they sent them electronically). See 18 U. S. C. §§1341, 1343 (2000 ed., Supp. III). Mail fraud and wire fraud are forms of "racketeering activity" for purposes of RICO. §1961(1)(B). Petitioners' conduct allegedly constituted a "pattern of racketeering activity," see §1961(5) (2000 ed.), because the fraudulent returns were submitted on an ongoing and regular basis.

Ideal asserts in its first cause of action that Joseph and Vincent Anza violated §1962(c), which makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, inter-

state or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The complaint states that the Anzas' goal, which they achieved, was to give National a competitive advantage over Ideal.

The second cause of action is asserted against all three petitioners. It alleges a violation of §1962(a), which makes it unlawful for any person who has received income derived from a pattern of racketeering activity "to use or invest" that income "in acquisition of any interest in, or the establishment or operation of," an enterprise engaged in or affecting interstate or foreign commerce. As described in the complaint, petitioners used funds generated by their fraudulent tax scheme to open National's Bronx location. The opening of this new facility caused Ideal to lose "significant business and market share." App. 18.

Petitioners moved to dismiss Ideal's complaint under Federal Rules of Civil Procedure 12(b)(6) and 9(b). The District Court granted the Rule 12(b)(6) motion, holding that the complaint failed to state a claim upon which relief could be granted. The court began from the proposition that to assert a RICO claim predicated on mail fraud or wire fraud, a plaintiff must have relied on the defendant's misrepresentations. Ideal not having alleged that it relied on petitioners' false tax returns, the court concluded Ideal could not go forward with its RICO claims.

Ideal appealed, and the Court of Appeals for the Second Circuit vacated the District Court's judgment. 373 F. 3d 251 (2004). Addressing Ideal's §1962(c) claim, the court held that where a complaint alleges a pattern of racketeering activity "that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim." *Id.*, at 263. This is the case, the court explained, "even where

the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Ibid.*

The court reached the same conclusion with respect to Ideal's §1962(a) claim. It reasoned that Ideal adequately pleaded its claim because it alleged an injury by reason of petitioners' use and investment of racketeering proceeds, "as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise." *Id.*, at 264.

We granted certiorari. 546 U. S. __ (2005).

II

Our analysis begins—and, as will become evident, largely ends—with *Holmes*. That case arose from a complaint filed by the Securities Investor Protection Corporation (SIPC), a private corporation with a duty to reimburse the customers of registered broker-dealers who became unable to meet their financial obligations. SIPC claimed that the petitioner, Robert Holmes, conspired with others to manipulate stock prices. When the market detected the fraud, the share prices plummeted, and the "decline caused [two] broker-dealers' financial difficulties resulting in their eventual liquidation and SIPC's advance of nearly $13 million to cover their customers' claims." 503 U. S., at 262–263. SIPC sued on several theories, including that Holmes participated in the conduct of an enterprise's affairs through a pattern of racketeering activity in violation of §1962(c) and conspired to do so in violation of §1962(d).

The Court held that SIPC could not maintain its RICO claims against Holmes for his alleged role in the scheme. The decision relied on a careful interpretation of §1964(c), which provides a civil cause of action to persons injured "by reason of" a defendant's RICO violation. The Court recognized the phrase "by reason of" could be read broadly

to require merely that the claimed violation was a "but for" cause of the plaintiff's injury. *Id.*, at 265–266. It rejected this reading, however, noting the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." *Id.*, at 266.

Proper interpretation of §1964(c) required consideration of the statutory history, which revealed that "Congress modeled §1964(c) on the civil-action provision of the federal antitrust laws, §4 of the Clayton Act." *Id.*, at 267. In *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519 (1983), the Court held that "a plaintiff's right to sue under §4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes*, *supra*, at 268 (citing *Associated Gen. Contractors*, *supra*, at 534). This reasoning, the Court noted in *Holmes*, "applies just as readily to §1964(c)." 503 U. S., at 268.

The *Holmes* Court turned to the common-law foundations of the proximate-cause requirement, and specifically the "demand for some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* It concluded that even if SIPC were subrogated to the rights of certain aggrieved customers, the RICO claims could not satisfy this requirement of directness. The deficiency, the Court explained, was that "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.*, at 271.

Applying the principles of *Holmes* to the present case, we conclude Ideal cannot maintain its claim based on §1962(c). Section 1962(c), as noted above, forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. The Court has indicated the compensable injury flowing from a violation of that provision "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern,

for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 497 (1985).

Ideal's theory is that Joseph and Vincent Anza harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers. The RICO violation alleged by Ideal is that the Anzas conducted National's affairs through a pattern of mail fraud and wire fraud. The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result.

The proper referent of the proximate-cause analysis is an alleged practice of conducting National's business through a pattern of defrauding the State. To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge customers for the applicable sales tax. The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State). The attenuation between the plaintiff's harms and the claimed RICO violation arises from a different source in this case than in *Holmes*, where the alleged violations were linked to the asserted harms only through the broker-dealers' inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.

This conclusion is confirmed by considering the directness requirement's underlying premises. See 503 U. S., at 269–270. One motivating principle is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action. See *id.*, at 269 ("[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"). The instant case is illustrative. The injury Ideal

alleges is its own loss of sales resulting from National's decreased prices for cash-paying customers. National, however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts. Cf. *id.*, at 271 ("The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors").

There is, in addition, a second discontinuity between the RICO violation and the asserted injury. Ideal's lost sales could have resulted from factors other than petitioners' alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices. Cf. *id.*, at 272–273 ("If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets").

The attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes*. Notwithstanding the lack of any appreciable risk of duplicative recoveries, which is another consideration relevant to the proximate-cause inquiry, see *id.*, at 269, these concerns help to illustrate

why Ideal's alleged injury was not the direct result of a RICO violation. Further illustrating this point is the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim. A court considering the claim would need to begin by calculating the portion of National's price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal's lost sales attributable to the relevant part of the price drop. The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims. See *id.*, at 269–270 ("[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely"). Again, the instant case is instructive. Ideal accuses the Anzas of defrauding the State of New York out of a substantial amount of money. If the allegations are true, the State can be expected to pursue appropriate remedies. The adjudication of the State's claims, moreover, would be relatively straightforward; while it may be difficult to determine facts such as the number of sales Ideal lost due to National's tax practices, it is considerably easier to make the initial calculation of how much tax revenue the Anzas withheld from the State. There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.

The Court of Appeals reached a contrary conclusion,

apparently reasoning that because the Anzas allegedly sought to gain a competitive advantage over Ideal, it is immaterial whether they took an indirect route to accomplish their goal. See 373 F. 3d, at 263. This rationale does not accord with *Holmes*. A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. See *Associated Gen. Contractors*, 459 U. S., at 537 ("We are also satisfied that an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss"). When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no. We hold that Ideal's §1962(c) claim does not satisfy the requirement of proximate causation.

Petitioners alternatively ask us to hold, in line with the District Court's decision granting petitioners' motion to dismiss, that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations. They argue that RICO's private right of action must be interpreted in light of common-law principles, and that at common law a fraud action requires the plaintiff to prove reliance. Because Ideal has not satisfied the proximate-cause requirement articulated in *Holmes*, we have no occasion to address the substantial question whether a showing of reliance is required. Cf. 503 U. S., at 275–276.

III

The amended complaint also asserts a RICO claim based on a violation of §1962(a). The claim alleges petitioners' tax scheme provided them with funds to open a new store in the Bronx, which attracted customers who otherwise would have purchased from Ideal.

In this Court petitioners contend that the proximate-

cause analysis should function identically for purposes of Ideal's §1962(c) claim and its §1962(a) claim. (Petitioners also contend that "a civil RICO plaintiff does not plead an injury proximately caused by a violation of §1962(a) merely by alleging that a corporate defendant reinvested profits back into itself," Brief for Petitioners 20, n. 5, but this argument has not been developed, and we decline to address it.) It is true that private actions for violations of §1962(a), like actions for violations of §1962(c), must be asserted under §1964(c). It likewise is true that a claim is cognizable under §1964(c) only if the defendant's alleged violation proximately caused the plaintiff's injury. The proximate-cause inquiry, however, requires careful consideration of the "relation between the injury asserted and the injurious conduct alleged." *Holmes*, *supra*, at 268. Because §1962(c) and §1962(a) set forth distinct prohibitions, it is at least debatable whether Ideal's two claims should be analyzed in an identical fashion for proximate-cause purposes.

The Court of Appeals held that Ideal adequately pleaded its §1962(a) claim, see 373 F. 3d, at 264, but the court did not address proximate causation. We decline to consider Ideal's §1962(a) claim without the benefit of the Court of Appeals' analysis, particularly given that the parties have devoted nearly all their attention in this Court to the §1962(c) claim. We therefore vacate the Court of Appeals' judgment with respect to Ideal's §1962(a) claim. On remand, the court should determine whether petitioners' alleged violation of §1962(a) proximately caused the injuries Ideal asserts.

* * *

The judgment of the Court of Appeals is reversed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–433

JOSEPH ANZA, ET AL., PETITIONERS *v.* IDEAL STEEL SUPPLY CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2006]

JUSTICE SCALIA, concurring.

I join the opinion of the Court. I also note that it is inconceivable that the injury alleged in the 18 U. S. C. §1962(c) claim at issue here is within the zone of interests protected by the RICO cause of action for fraud perpetrated upon New York State. See *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 286–290 (1992) (SCALIA, J., concurring in judgment).

SUPREME COURT OF THE UNITED STATES

No. 04–433

JOSEPH ANZA, ET AL., PETITIONERS *v.* IDEAL STEEL SUPPLY CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2006]

JUSTICE THOMAS, concurring in part and dissenting in part.

The Court today limits the lawsuits that may be brought under the civil enforcement provision of the Racketeer Influenced and Corrupt Organizations Act (RICO or Act), 18 U. S. C. §1961 *et seq.* (2000 ed. and Supp. III), by adopting a theory of proximate causation that is supported neither by the Act nor by our decision in *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992), on which the Court principally relies. The Court's stringent proximate-causation requirement succeeds in precluding recovery in cases alleging a violation of §1962(c) that, like the present one, have nothing to do with organized crime, the target of the RICO statute. However, the Court's approach also eliminates recovery for plaintiffs whose injuries are precisely those that Congress aimed to remedy through the authorization of civil RICO suits. Because this frustration of congressional intent is directly contrary to the broad language Congress employed to confer a RICO cause of action, I respectfully dissent from Part II of the Court's opinion.

I

The language of the civil RICO provision, which broadly permits recovery by "[a]ny person injured in his business

or property by reason of a violation" of the Act's substantive restrictions, §1964(c) (2000 ed.), plainly covers the lawsuit brought by respondent. Respondent alleges that he was injured in his business, and that this injury was the direct result of petitioners' violation of §1962(c).[1] App. 12–17. In *Holmes*, however, we held that a RICO plaintiff is required to show that the RICO violation "not only was a 'but for' cause of his injury, but was the proximate cause as well." 503 U. S., at 268. We employed the term "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Ibid.* These tools reflect "'ideas of what justice demands, or of what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984) (hereinafter Prosser & Keeton)).

Invoking one of the common-law proximate-cause considerations, we held that a RICO plaintiff must prove "some direct relation between the injury asserted and the injurious conduct alleged." 503 U. S., at 268. Today the Court applies this formulation of proximate causation to conclude that the "attenuated and uncertain relationship" between the violation of §1962(c) and Ideal's injury "cannot consistent with *Holmes*' demand for directness, sustain Ideal's claim." *Ante*, at 6. But the Court's determination relies on a theory of "directness" distinct from that adopted by *Holmes*.

In *Holmes*, the Court explained that "a plaintiff who

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[1] Respondent also alleges that petitioners injured his business through a violation of §1962(a), although the parties dedicate little attention to this issue. In light of the Court's disposition of the §1962(c) claim and the limited discussion of §1962(a) by the parties, I agree with the Court that we should give the Court of Appeals the first opportunity to reconsider the §1962(a) claim. Accordingly, I join Part III of the Court's opinion.

complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." 503 U. S., at 268–269. The plaintiff in *Holmes* was indirect in precisely this sense. The defendant was alleged to have participated in a stock manipulation scheme that disabled two broker-dealers from meeting their obligations to customers. Accordingly, the plaintiff, Securities Investor Protection Corporation (SIPC), had to advance nearly $13 million to cover the claims of customers of those broker-dealers. SIPC attempted to sue based on the claim that it was subrogated to the rights of those customers of the broker-dealers who did not purchase manipulated securities. We held that the nonpurchasing customers' injury was not proximately caused by the defendant's conduct, because "the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims." *Id.*, at 271.[2]

Here, in contrast, it was not *New York's injury* that caused respondent's damages; rather, it was petitioners' own conduct—namely, their underpayment of tax—that permitted them to undercut respondent's prices and thereby take away its business. Indeed, the Court's acknowledgment that there is no appreciable risk of duplicative recovery here, in contrast to *Holmes*, *ante*, at 7, is effectively a concession that petitioners' damages are not indirect, as that term is used in *Holmes*. See 503 U. S., at

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[2]Sutherland's treatise on damages, on which the Court relied in *Holmes*, labels the same type of claims indirect: those where one party is injured, and it is that very injury—and not the wrongful behavior by the tortfeasor—that causes the injury to the plaintiff. See 1 J. Sutherland, Law of Damages 55 (1882) (hereinafter Sutherland). Indeed, every example cited in Sutherland in illustration of this principle parallels *Holmes;* the plaintiff would not be injured absent the injury to another victim. See Sutherland 55–56.

269 ("[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries"). The mere fact that New York is a direct victim of petitioners' RICO violation does not preclude Ideal's claim that it too is a direct victim. Because the petitioners' tax underpayment directly caused respondent's injury, *Holmes* does not bar respondent's recovery.

The Court nonetheless contends that respondent has failed to demonstrate proximate cause. It does so by relying on our observation in *Holmes* that the directness requirement is appropriate because "'[t]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors.'" *Ante*, at 6 (quoting *Holmes*, *supra*, at 269, in turn, citing *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519 (1983)). In *Holmes*, we noted that it would be hard for the District Court to determine how much of the broker-dealers' failure to pay their customers was due to the fraud and how much was due to other factors affecting the broker-dealers' business success. 503 U. S., at 273–274. The Court contends that here, as in *Holmes*, it is difficult to "ascertain the damages caused by some remote action." *Ante*, at 6.

The Court's reliance on the difficulty of ascertaining the amount of Ideal's damages caused by petitioners' unlawful acts to label those damages indirect is misguided. *Holmes* and *Associated General Contractors* simply held that one reason that *indirect* injuries should not be compensable is that such injuries are difficult to ascertain. *Holmes*, *supra*, at 269; *Associated General Contractors*, *supra*, at 542. We did not adopt the converse proposition that any injuries that are difficult to ascertain must be classified as

indirect for purposes of determining proximate causation.[3]

Proximate cause and certainty of damages, while both related to the plaintiff's responsibility to prove that the amount of damages he seeks is fairly attributable to the defendant, are distinct requirements for recovery in tort.[4] See 4 Restatement (Second) of Torts §912 (1977) (certainty of damages); 2 *id.*, §§430–431 (1963–1964) (proximate causation). That is, to recover, a plaintiff must show *both* that his injury is sufficiently connected to the tort that "the moral judgment and practical sense of mankind [will] recognize responsibility in the domain of morals," Sutherland 18, and that the specific pecuniary advantages, the loss of which is alleged as damages, "would have resulted, and, therefore, that the act complained of prevented them," *id.*, at 106–107. *Holmes* and *Associated General Contractors* dealt primarily with the former showing. The Court's discussion of the Union's "highly speculative" damages in *Associated General Contractors* focused not on the difficulty of proving the precise amount of damages, but with "the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury." 459 U. S., at 545. Here, the relationship between the alleged RICO violation and the

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[3]Indeed, in *Associated General Contractors*, we did not even squarely hold that the reason that indirect damages are not compensable was that the damages were not easily ascertainable; instead, we merely recognized the empirical fact that "[p]artly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative." 459 U. S., at 542.

[4]Sutherland described the interrelation between the two concepts: "A fatal uncertainty may infect a case where an injury is easily provable, but the alleged responsible cause cannot be sufficiently established as to the whole or some part of that injury. So it may exist where a known and provable wrong or violation of contract appears, but the alleged loss or injury as a result of it cannot be certainly shown." Sutherland 94.

alleged injury is clear: Petitioners underpaid sales tax, permitting them to undercharge sales tax, inflicting competitive injury on respondent. The question with which the Court expresses concern—whether Ideal can prove the amount of its actual damages "with sufficient certainty," Sutherland 106, to permit recovery—is simply not before the Court.

It is nonetheless worth noting that the Court overstates the difficulties of proof faced by respondent in this case. Certainly the plaintiff in this case, as in all tort cases involving damage to business, must demonstrate that he suffered a harm caused by the tort, and not merely by external market conditions. See generally Prosser & Keeton §130, at 1014–1015, and nn. 92–99 (gathering cases authorizing liability for torts that "deprive" the plaintiff of customers or other prospects"); cf. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 342 (2005) ("[A]n inflated purchase price will not itself constitute or proximately cause the relevant economic loss," absent evidence that it was the inflated price that actually caused harm). But under the facts as alleged by Ideal, National did not generally lower its prices, so the Court need not inquire into "any number of reasons," *ante*, at 7, that it might have done so.[5] Instead, it simply *ceased charging tax* on cash sales, allegedly, and logically, because it had ceased reporting those sales and accordingly was not itself paying sales tax on them. App. 11–13. Nor is it fatal to Ideal's proof of damages that National could have continued to

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[5]Nor is it fair to require a plaintiff to prove that the tort caused the lowering of prices at the motion to dismiss stage. Ideal's complaint alleges that petitioners "pass on to National's customers the sales tax 'savings' that National realizes as a result of its false returns." App. 16. This allegation that, as a factual matter, National was able to charge a lower price after tax because of its fraud suffices to permit Ideal to survive a motion to dismiss on the question whether the prices were lowered due to the fraud, as opposed to other factors.

charge taxes to its customers and invested the additional money elsewhere. *Ante*, at 7. Had National actually done so, it might be difficult to ascertain the damages suffered by Ideal as a result of that investment. But the mere fact that National *could have* committed tax fraud without readily ascertainable injury to Ideal does not mean that its tax fraud *necessarily* caused no readily ascertainable injury in this case. Likewise, the Court is undoubtedly correct that "Ideal's lost sales could have resulted from factors other than petitioners' alleged tax frauds." *Ibid.* However, the means through which the fraudulent scheme was carried out—with sales tax charged on noncash sales, but no tax charged on cash sales—renders the damages more ascertainable than in the typical case of lost business. In any event, it is well within the expertise of a district court to evaluate testimony and evidence and determine what portion of Ideal's lost sales are attributable to National's lower prices and what portion to other factors.

The Court also relies on an additional reason *Holmes* gave for limiting recovery to direct victims—namely, that "[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Ante*, at 8 (citing *Holmes*, 503 U. S., at 269–270). Certainly, New York can sue here and vindicate the law, rendering respondent's enforcement of the law less necessary than it would be if respondent were the only direct victim of the illegal activity. But our recognition in *Holmes* that limiting recovery to direct victims would not undermine deterrence does not support the conclusion that any victim whose lawsuit is unnecessary for deterrence is an indirect victim. Indeed, in any tort case with multiple possible plaintiffs, a single plaintiff's lawsuit could suffice to vindicate the law. If multiple plaintiffs are direct victims of a tort, it would be unjust to

declare some of their lawsuits unnecessary for deterrence, absent any basis for doing so in the relevant statute. Because respondent's injuries result from petitioners' fraud, and not from New York's injuries, respondent has a right to recover equal to that of New York.

Application of common-law principles of proximate causation beyond the directness requirement likewise supports a finding that causation was sufficiently pleaded in this case. Though the *Holmes* Court noted that directness was "one of [the] central elements" it had considered in evaluating causation, it recognized that proximate causation took "many shapes" at common law. *Id.*, at 268. Cf. Prosser & Keeton §42, at 273 (noting "two contrasting theories of legal cause," one extending liability to, but not beyond, "the scope of the 'foreseeable risks,'" and the other extending liability to, but not beyond, all "'directly traceable'" consequences and those indirect consequences that are foreseeable).[6] The proximate-cause limitation serves to ensure that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." Sutherland 57. "If one's fault happens to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for such unexpected result." *Ibid.* Based on this principle, courts have historically found proximate causation for injuries from natural causes, if a wrongful act "rendered it probable that such an injury will occur," *id.*, at 62; for injuries where the plaintiff's reliance is the immediate cause, such as in an action for fraud, so long as the reliance was "reasonably induced by the prior misconduct of the defendant," *id.*, at 62–63; and for injuries where an innocent third party intervenes between the tortfeasor and the victim,

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[6]Prosser and Keeton appear to use "direct" in a broader sense than that adopted by the Court in *Holmes*. See Prosser & Keeton §43, at 273, 293–297.

such that the innocent third party is the *immediate* cause of the injury, so long as the tortfeasor "contributed so effectually to [the injury] as to be regarded as the efficient or at least concurrent and responsible cause," *id.*, at 64–65 (emphasis deleted).

The Court of Appeals, by limiting RICO plaintiffs to those who are "'the targets, competitors and intended victims of the racketeering enterprise,'" 373 F. 3d 251, 260 (CA2 2004) (quoting *Lerner* v. *Fleet Bank, N. A.*, 318 F. 3d 113, 124 (CA2 2003)), outlined a proximate-causation standard that falls well in line both with the reasoning behind having a proximate-cause requirement at all, and with the traditional applications of this standard to tortfeasors who caused injury only through a two-step process. The Court, in contrast, permits a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior. A defendant may do so simply by concocting a scheme under which a further, lawful and intentional step *by the defendant* is required to inflict the injury. Such a rule precludes recovery for injuries for which the defendant is plainly morally responsible and which are suffered by easily identifiable plaintiffs. There is no basis in the RICO statute, in common-law tort, or in *Holmes* for reaching this result.

II

Because neither the plain language of the civil RICO provision nor our precedent supports the Court's holding, it must be rejected. It is worth noting, however, that while the Court's holding in the present case may prevent litigation in an area far removed from the concerns about organized crime that led to RICO's enactment, that holding also precludes civil recovery for losses sustained by business competitors as a result of quintessential organized criminal activity, cases Congress indisputably in-

tended its broad language to reach.

Congress plainly enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations. See *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 245 (1989). There is some evidence, to be sure, that the drafters knew that RICO would have the potential to sweep more broadly than organized crime and did not find that problematic. *Id.*, at 246–248. Nevertheless, the Court has recognized that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 500 (1985).

Judicial sentiment that civil RICO's evolution is undesirable is widespread.[7] Numerous justices have expressed dissatisfaction with either the breadth of RICO's application, *id.*, at 501 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) ("The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. . . . [T]here is no indication that Congress even considered, much less approved, the scheme that the Court today defines"), or its general vagueness at outlining the conduct it is intended to prohibit, *H. J. Inc.*, *supra*,

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[7]See Rehnquist, Remarks of the Chief Justice, 21 St. Mary's L. J. 5, 13 (1989) ("I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court"); Sentelle, Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers, 12 Campbell L. Rev. 145, 148 (1990) ("[E]very single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal* [,Get RICO Cases Out of My Courtroom, May 19, 1983, p. A14, col. 4]").

at 255–256 (SCALIA, J., joined by Rehnquist, C. J., and O'Connor and KENNEDY, JJ., concurring in judgment) ("No constitutional challenge to this law has been raised in the present case . . . . That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented"). Indeed, proposals for curtailing civil RICO have been introduced in Congress; for example, the Private Securities Litigation Reform Act, enacted in 1995, removed securities fraud as a predicate act under RICO. Pub. L. 104–67, §107, 109 Stat. 758, amending 18 U. S. C. §1964(c); see also Abrams, Crime Legislation and the Public Interest: Lessons from Civil RICO, 50 SMU L. Rev. 33, 34 (1996).

This case, like the majority of civil RICO cases, has no apparent connection to organized crime. See *Sedima*, 473 U. S., at 499, n. 16 (quoting an ABA Task Force determination that, over the period reviewed, only 9% of civil RICO cases at the trial court level involved "'allegations of criminal activity of a type generally associated with professional criminals'"). Given the distance the facts of this case lie from the prototypical organized criminal activity that led to RICO's enactment, it is tempting to find in the Act a limitation that will keep at least this and similar cases out of court.

The Court's attempt to exclude this case from the reach of civil RICO, however, succeeds in eliminating not only cases that lie far outside the harm RICO was intended to correct, but also those that were at the core of Congress' concern in enacting the statute. The Court unanimously recognized in *Sedima* that one reason—and, for the dissent, the principal reason—Congress enacted RICO was "to protect businesses against competitive injury from organized crime. See *id.*, at 500–523 (Marshall, J., dissenting) (concluding that the provision conferring a right of action on individual plaintiffs had as its "principal target . . . the

economic power of racketeers, and its toll on legitimate businessmen"); *id.*, at 494–500.

The unanimous view of the *Sedima* Court is correct. The sponsor of a Senate precursor to RICO noted that "'*the* evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime.'" *Id.*, at 514 (Marshall, J., dissenting) (quoting 113 Cong. Rec. 17999 (1967) (remarks of Senator Hruska); some emphasis deleted); see also 473 U. S., at 515 (Marshall, J., dissenting) ("'When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are eliminated and customers confined to sponsored suppliers'"). Upon adding a provision for a civil remedy in a subsequently proposed bill, Senator Hruska noted:

> "'[This] bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap.'" *Id.*, at 516 (Marshall, J., dissenting) (quoting 115 Cong. Rec. 6993 (1969); emphasis deleted).

A portion of these bills was ultimately included in RICO, which was attached as Title IX to the Organized Crime Control Act. The Committee Report noted that the Title "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 91–617, p. 76 (1969).

The observations of the President's Commission on Law Enforcement and Administration of Justice, the source of

much of the congressional concern over organized crime, are consistent with these statements. Its chapter on Organized Crime noted that "organized crime is also extensively and deeply involved in legitimate business. . . . [I]t employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal profits from the public." The Challenge of Crime in a Free Society, p. 187 (1967). The report noted that "[t]he millions of dollars [organized crime] can throw into the legitimate economic system gives it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business." *Ibid.*

It is not difficult to imagine a competitive injury to a business that would result from the kind of organized crime that *Sedima*, Congress, and the Commission all recognized as the principal concern of RICO, yet that would fail the Court's restrictive proximate-cause test. For example, an organized crime group, running a legitimate business, could, through threats of violence, persuade its supplier to sell goods to it at cost, so that it could resell those goods at a lower price to drive its competitor out of the business. Honest businessmen would be unable to compete, as they do not engage in threats of violence to lower their costs. Civil RICO, if it was intended to do anything at all, was intended to give those businessmen a cause of action. Cf. Sedima, 473 U. S., at 521–522 (Marshall, J., dissenting). Yet just like respondent, those businessmen would not themselves be the immediate target of the threats; the target would be the supplier. Like respondent's injury, their injury would be most immediately caused by the lawful activity of price competition, not the unlawful activity of threatening the supplier. Accordingly, under the Court's view, the honest business-

man competitor would be just an "indirect" victim, whose injury was not proximately caused by the RICO violation.[8] Civil RICO would thus confer no right to sue on the individual who did not himself suffer the threats of violence, even if the threats caused him harm.

As a result, after today, civil RICO plaintiffs that suffer precisely the kind of injury that motivated the adoption of the civil RICO provision will be unable to obtain relief. If this result was compelled by the text of the statute, the interference with congressional intent would be unavoidable. Given that the language is not even fairly susceptible of such a reading, however, I cannot agree with this frustration of congressional intent.

III

Because I conclude that Ideal has sufficiently pleaded proximate cause, I must proceed to the question which the Court does not reach: whether reliance is a required element of a RICO claim predicated on mail or wire fraud and, if it is, whether that reliance must be by the plaintiff. The Court of Appeals held that reliance is required, but that "a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff." 373 F. 3d, at 262–263. I disagree with the conclusion that reliance is required at all. In my view, the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.

Petitioners are correct that the common law generally required a showing of justifiable reliance before a plaintiff

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[8]The honest businessman would likewise fail JUSTICE SCALIA's theory of proximate causation, because laws against threats of violence are intended to protect those who are so threatened, not other parties that might suffer as a consequence. *Ante*, at 1 (concurring opinion).

could recover for damages caused by fraud. See *Neder* v. *United States*, 527 U. S. 1, 24–25 (1999); Prosser & Keeton §105, at 728. But RICO does not confer on private plaintiffs a right to sue defendants who engage in any act of common-law fraud; instead, racketeering activity includes, as relevant to this case, "any act which is indictable under [18 U. S. C. §]1341 (relating to mail fraud) [and §]1343 (relating to wire fraud)." §1961(1) (2000 ed., Supp. III). And we have recognized that these criminal fraud statutes "did not incorporate *all* the elements of common-law fraud." *Neder*, 527 U. S., at 24. Instead, the criminal mail fraud statute applies to anyone who "having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service . . . ." §1341. See §1343 (similar language for wire fraud). We have specifically noted that "[b]y prohibiting the 'scheme to defraud,' rather than the completed fraud, the element of reliance . . . would clearly be inconsistent with the statutes Congress enacted." *Id.*, at 25.

Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of §1962, without proof of reliance. Accordingly, it cannot be disputed that the Government could prosecute a person for such behavior. The terms of §1964(c) (2000 ed.), which broadly authorize suit by "[a]ny person injured in his business or property by reason of a violation of section 1962," permit no different conclusion when an individual brings a civil action against such a RICO violator.

It is true that our decision in *Holmes* to apply the common-law proximate cause requirement was likewise not compelled by the broad language of the statute. But our decision in that case was justified by the "very unlikelihood that Congress meant to allow all factually injured

plaintiffs to recover." 503 U. S., at 266. This unlikelihood stems, in part, from the nature of proximate cause, which is "not only a general condition of civil liability at common law but is almost essential to shape and delimit a rational remedy." *Systems Management, Inc.* v. *Loiselle*, 303 F. 3d 100, 104 (CA1 2002). We also decided *Holmes* in light of Congress' decision to use the same words to impose civil liability under RICO as it had in §7 of the Sherman Act, 26 Stat. 210, into which federal courts had implied a proximate-cause limitation. 503 U. S., at 268. Accordingly, it was fair to interpret the broad language "by reason of" as meaning, in all civil RICO cases, that the violation must be both the cause-in-fact and the proximate cause of the plaintiff's injury.

Here, by contrast, the civil action provision cannot be read to always require that the plaintiff have relied on the defendant's action. Reliance is not a general limitation on civil recovery in tort; it "is a specialized condition that happens to have grown up with common law fraud." *Loiselle, supra*, at 104. For most of the predicate acts underlying RICO violations, it cannot be argued that the common law, if it even recognized such acts as civilly actionable, required proof of reliance. See §1961 (2000 ed., Supp. III). In other words, there is no language in §1964(c) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined "racketeering activity" to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law.

Because reliance cannot be read into §§1341 and 1343, nor into RICO itself, it is not an element of a civil RICO claim. This is not to say that, in the general case, a plaintiff will not have to prove that someone relied on the predicate act of fraud as part of his case. If, for example,

New York had not believed petitioners' misrepresentation with respect to their sales, Ideal may well not have been injured by petitioners' scheme, which would have faltered at the first step. Indeed, the petitioners recognize that "in the ordinary misrepresentation case, the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of §1964(c)." Brief for Petitioners 29. But the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action. See *Loiselle, supra*, at 104 ("Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way"). Because respondent need not allege reliance at all, its complaint, which alleges that New York relied on petitioners' misrepresentations, App. 16, is more than sufficient.

* * *

The Congress that enacted RICO may never have intended to reach cases like the one before us, and may have "federalize[d] a great deal of state common law" without any intention of "produc[ing] these far-reaching results." *Sedima*, 473 U. S., at 506 (Marshall, J., dissenting). But this Court has always refused to ignore the language of the statute to limit it to "the archetypal, intimidating mobster," and has instead recognized that "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications." *Id.*, at 499–500. Today, however, the Court not only eliminates private RICO actions in some situations Congress may have inadvertently regulated, but it substantially limits the ability of civil RICO to reach even those cases that motivated Congress' enactment of this provision in the first place. I respectfully dissent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2006]

JUSTICE BREYER, concurring in part and dissenting in part.

In my view, the civil damages remedy in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§1961–1968 (2000 ed. and Supp. III), does not cover claims of injury by one competitor where the legitimate pro-competitive activity of another competitor immediately causes that injury. I believe that this is such a case and would consequently hold that RICO does not authorize the private action here at issue.

I

A

RICO essentially seeks to prevent organized criminals from taking over or operating legitimate businesses. Its language, however, extends its scope well beyond those central purposes. RICO begins by listing certain predicate acts, called "'racketeering activity,'" which consist of other crimes, ranging from criminal copyright activities, the facilitation of gambling, and mail fraud to arson, kidnapping and murder. §1961(1). It then defines a "'pattern of racketeering activity'" to include engaging in "at least two" predicate acts in a 10-year period. §1961(5) (2000 ed.). And it forbids certain business-related activities involving such a "pattern" and an "enterprise." The for-

bidden activities include using funds derived from a "pattern of racketeering activity" in acquiring, establishing, or operating any enterprise, and conducting the affairs of any enterprise through such "a pattern." §§1962(a), (c).

RICO, a federal criminal statute, foresees criminal law enforcement by the Federal Government. §1963 (2000 ed., Supp. III). It also sets forth civil remedies. §1964 (2000 ed.). District courts "have jurisdiction to prevent and restrain [RICO] violations." §1964(a). And a person "injured in his business or property by reason of a [RICO] violation" may seek treble damages and attorney's fees. §1964(c).

B

The present case is a private RICO treble-damages action. A steel supply company, Ideal Steel, has sued a competing steel supply company, National Steel, and its owners, Joseph and Vincent Anza (to whom I shall refer collectively as "National"). Ideal says that National committed mail fraud by regularly filing false New York state sales tax returns in order to avoid paying sales tax that it owed—activity that amounts to a "pattern of racketeering activity." This activity enabled National to charge lower prices without reducing its profit margins. Ideal says National used some of these excess profits to fund the building of a new store. Both the lower prices and the new outlet attracted Ideal customers, thereby injuring Ideal. Hence, says Ideal, it was injured "in [its] business . . . by reason of" violations of two RICO provisions, the provision that forbids conducting an "enterprise's affairs" through a "pattern of racketeering activity" and the provision that forbids investing funds derived from such a "pattern" in an "enterprise." §§1962(c), (a). The question before us is whether RICO permits Ideal to bring this private treble-damages claim.

II

This Court, in *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992), held that RICO's private treble-damages provision "demand[ed] . . . some direct relation between the injury asserted and the injurious conduct alleged." The Court then determined that the injury alleged by the plaintiff in that case was too remote from the injurious conduct to satisfy this requirement.

I do not agree with the majority insofar as it believes that *Holmes'* holding in respect to the fact pattern there at issue virtually dictates the answer to the question here. In my view, the "causal connection" between the forbidden conduct and plaintiff's harm is, in certain key ways, more direct here than it was in *Holmes*. In *Holmes*, the RICO plaintiff was a surrogate for creditors of broker-dealers that went bankrupt after losing money in stocks that had been overvalued due to fraudulent statements made by the RICO defendant and others. Put in terms of "proximate cause," the plaintiff's harm (an ordinary creditor loss) differed in kind from the harm that the "predicate acts" (securities fraud) would ordinarily cause (stock-related monetary losses). The harm was "indirect" in the sense that it was entirely derivative of the more direct harm the defendant's actions had caused the broker-dealers; and, there were several steps between the violation and the harm (misrepresentation—broker-dealer losses—broker-dealer business failure—ordinary creditor loss). Here, however, the plaintiff alleges a harm (lost customers) that flows directly from the lower prices and the opening of a new outlet—actions that were themselves allegedly caused by activity that Congress designed RICO to forbid (conducting a business through a "pattern" of "predicate acts" and investing in a business funds derived from such a "pattern"). In this sense, the causal links before us are more "direct" than those in *Holmes*. See *ante*, at 2–4 (THOMAS, J., concurring in part and dissent-

ing in part).

Nonetheless, I agree with the majority that *Holmes* points the way. That case makes clear that RICO contains important limitations on the scope of private rights of action. It specifies that RICO does not provide a private right of action "simply on showing that the defendant violated §1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of the plaintiff's injury." 503 U. S., at 265–266 (footnote omitted). Pointing out "the very unlikelihood that Congress meant to allow *all* factually injured plaintiffs to recover," *id.*, at 266 (emphasis added), *Holmes* concludes that RICO imposes a requirement of "proximate cause," a phrase that "label[s] generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.*, at 268. It recognizes that these tools seek to discern "'what justice demands, or . . . what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984)). It also explains that "proximate cause" demands "directness," while specifying that "directness" is only one of "the many shapes this concept took at common law." 503 U. S., at 268–269. And it points to antitrust law, both as a source of RICO's treble-damages provisions and as an aid to their interpretation. *Ibid.*

In my view, the "antitrust" nature of the treble-damage provision's source, taken together with both RICO's basic objectives and important administrative concerns, implies that a cause is "indirect," *i.e.*, it is not a "proximate cause," if the causal chain from forbidden act to the injury caused a competitor proceeds through a legitimate business's ordinary competitive activity. To use a physical metaphor, ordinary competitive actions undertaken by the defendant competitor cut the *direct* causal link between the plaintiff competitor's injuries and the forbidden acts.

The basic objective of antitrust law is to encourage the competitive process. In particular, that law encourages businesses to compete by offering lower prices, better products, better methods of production, and better systems of distribution. See, *e.g.*, 1 P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶100a, pp. 3–4 (2d ed. 2000). As I shall explain, these principles suggest that RICO does not permit private action based solely upon this competitive type of harm, *i.e.*, harm a plaintiff suffers only because the defendant was able to attract customers through normal competitive methods, such as lower prices, better products, better methods of production, or better systems of distribution. In such cases, the harm falls outside the limits that RICO's private treble-damages provision's "proximate-cause" requirement imposes. In such cases the distance between the harm and the predicate acts that funded (or otherwise enabled) such ordinary competitive activity is too distant. The harm is not "direct."

At the same time, those principles suggest that other types of competitive injuries not within their protective ambit could lie within, not outside, "proximate-cause" limits. Where, for example, a RICO defendant attracts customers in ways that involve illegitimate competitive means, *e.g.*, by threatening violence, a claim may still lie. Claims involving RICO violations that objectively target a particular competitor, *e.g.*, bribing an official to harass a competitor, could also be actionable.

Several considerations lead to this conclusion. First, I have found no case (outside the Second Circuit, from which this case arose) in which a court has authorized a private treble-damages suit based upon no more than a legitimate business's ordinary pro-competitive activity (even where financed by the proceeds of a RICO predicate act).

Second, an effort to bring harm caused by ordinary

competitive activity within the scope of RICO's private treble-damages action provision will raise serious problems of administrability. *Ante*, at 6–8 (majority opinion); see also *Holmes*, *supra*, at 269. To demonstrate that a defendant's lower price caused a plaintiff to lose customers (or profits) requires the plaintiff to show what would have happened in its absence. Would customers have changed suppliers irrespective of the price change because of other differences in the suppliers? Would other competing firms have lowered their prices? Would higher prices have attracted new entry? Would demand for the industry's product, or the geographic scope of the relevant market, have changed? If so, how? To answer such questions based upon actual market circumstances and to apportion damages among the various competitors harmed is difficult even for plaintiffs trying to trace harm caused by a defendants' *anti*-competitive behavior. *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 542, 544 (1983) (the possibility that harm "may have been produced by independent factors" and "the danger of complex apportionment of damages" weigh against finding the requisite causal connection in an antitrust case). To answer such questions in the context of better functioning markets, where prices typically reflect competitive conditions, would likely prove yet more difficult.

Third, where other victims, say victims of the underlying RICO "predicate acts" are present, there is no pressing need to provide such an action. Those alternative victims (here the State of New York) typically "could be counted on to bring suit for the law's vindication." *Holmes*, *supra*, at 273. They could thus fulfill Congress' aim in adopting the civil remedy of "turn[ing victims] into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella* v. *Wood*, 528 U. S. 549, 557 (2000) (quoting *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 187 (1997)).

Fourth, this approach to proximate cause would retain private actions aimed at the heart of Congress' relevant RICO concerns. RICO's sponsors, in reporting their underlying reasons for supporting RICO, emphasized, not the fair, ordinary competition that an infiltrated business might offer its competitors, but the risk that such a business would act corruptly, exercising *unfair* methods of competition. S. Rep. No. 91–617, pp. 76–78 (1969); see also *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 165 (2001). RICO focuses upon the "infiltration of legitimate business by organized crime," in significant part because, when "'organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses.'" *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 517, 515 (1985) (Marshall, J., dissenting) (quoting 113 Cong. Rec. 17999 (1967)).

My approach would not rule out private actions in such cases. Nor would it rule out three of the four suits mentioned by Justice Marshall, dissenting in *Sedima*, when he describes RICO's objectives. It would not rule out lawsuits by injured competitors or legitimate investors if a racketeer, "uses '[t]hreats, arson and assault . . . to force competitors out of business'"; "uses arson and threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers"; or "displace[s]" an "honest investor" when he "infiltrates and obtains control of a legitimate business . . . through fraud" or the like. 473 U. S., at 521–522.

I concede that the approach would rule out a competitor's lawsuit based on no more than an "infiltrated enterprise" operating a legitimate business to a businessman's competitive disadvantage because unlawful predicate acts helped that legitimate business build "a strong economic base." And I recognize that this latter kind of suit at least arguably would have provided helpful deterrence had the view of *Sedima's dissenting Justices* prevailed. *Id.*, at

500–523 (Marshall, J., dissenting) (arguing that RICO's private action provision did not authorize suits based on harm flowing directly from predicate acts); *id.*, at 523–530 (Powell, J., dissenting) (same). But the dissent did not prevail, and the need for deterrence consequently offers only weakened support for a reading of RICO that authorizes private suits in this category.

Fifth, without this limitation, RICO enforcement and basic antitrust policy could well collide. Firms losing the competitive battle might find bases for a RICO attack on their more successful competitors in claimed misrepresentations or even comparatively minor misdeeds by that competitor. Firms that fear such treble-damages suits might hesitate to compete vigorously, particularly in concentrated industries where harm to a competitor is more easily traced but where the consumer's need for vigorous competition is particularly strong. The ultimate victim of any such tendency to pull ordinary competitive punches of course would be not the competing business, but the consumer. Although Congress did not intend its RICO treble-damages provision as a simple copy of the antitrust laws' similar remedies, see, *e.g.*, *Sedima*, *supra*, at 498–499, there is no sound reason to interpret RICO's treble-damages provision as if Congress intended to set it and its antitrust counterpart at cross-purposes.

For these reasons, I would read into the private treble-damages provision a "proximate-cause" limitation that places outside the provision harms that are traceable to an unlawful act only through a form of legitimate competitive activity.

III

Applying this approach to the present case, I would hold that neither of Ideal's counts states a RICO private treble-damages claim. National is a legitimate business. Another private plaintiff (the State of New York) is available.

The question is whether Ideal asserts a harm caused directly by something other than ordinary competitive activity, *i.e.*, lower prices, a better product, a better distribution system, or a better production method.

Ideal's second count claims injury caused by National's (1) having taken customers (2) attracted by its new store (3) that it financed in part through profits generated by the tax fraud scheme, and the financing is the relevant violation. §1962(a). The opening of a distribution outlet is a legitimate competitive activity. It benefits the firm that opens it by making it more convenient for customers to purchase from that supplier. That ordinary competitive process is all the complaint describes. And for the reasons I have given in Part II, *supra*, I believe that the financing of a new store—even with funds generated by unlawful activities—is not sufficient to create a private cause of action as long as the activity funded amounts to legitimate competitive activity. Ideal must look for other remedies, *e.g.*, bringing the facts to the attention of the United States Attorney or the State of New York.

Ideal's first count presents a more difficult question. It alleges that National filed false sales tax returns to the State of New York. As an action indictable under the federal mail fraud statute, that action is a predicate act under RICO. See §1961(1) (2000 ed., Supp. III). National passed these savings on to its cash customers by not charging them sales tax, thereby attracting more cash customers than it would have without the scheme. Is this a form of injury caused, not by ordinary competitive activity, but simply by the predicate act itself?

In my view, the answer to this question is "no." The complaint alleges predicate acts that amount simply to the facts that National did not "charge" or "pay" sales taxes or accurately "report" sales figures to the State. National did not tell its customers, "We shall not pay sales taxes." Rather, it simply charged the customer a lower price, say,

$100 rather than $100 plus $8 tax. Consider a retailer who advertises to the customer a $100 table and adds, "We pay all sales taxes." Such a retailer is telling the customer that he will charge the customer a lower price by the amount of the tax, *i.e.*, about $92. The retailer implies that he, the retailer, will pay the tax to the State, taking the requisite amount owed to the State from the $100 the customer paid for the item.

The defendants here have done no more. They have in effect cut the price of the item by the amount of the sales tax and then kept the money instead of passing it on to the State. They funded the price cut from the savings, but the source of the savings is, in my view, beside the point as long as the price cut itself is legitimate. I can find nothing in the complaint that suggests it is not.

For these reasons, I would reverse the decision of the Court of Appeals on both counts.